Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

JACKSON BAYNARD,

Petitioner,

v.

ALEXANDRIA CITY SCHOOL BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Was the evidence presented at trial insufficient, as a matter of law, so that no reasonable jury could find that the Alexandria Public School Board had "actual notice" of discrimination under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*?

Was the evidence presented at trial insufficient, as a matter of law, so that no reasonable jury could find that the school principal was an "appropriate authority" under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, to institute corrective measures on behalf of a school district for discriminatory conduct?

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Appendix B — Memorandum Opinion And Order Of The United States District Court For The Eastern District Of Virginia, Alexandria Division Dated And Filed September 12, 2000 ..... 31a

Petitioner, Jackson Baynard, respectfully prays that a writ of certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit entered in the above proceedings on September 26, 2001. The petitioner limits this petition for writ of certiorari to only those issues involving the liability of the Alexandria City School Board pursuant to Title IX of the Education of 1972, 20 U.S.C. § 1681, *et seq.*

OPINIONS BELOW

The Memorandum of Opinion of the United States District Court for the Eastern District of Virginia is reported at 112 F. Supp. 2d 524 (E.D. Va. 2000) and reprinted in Appendix B, *infra*. The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 268 F.3d 228 (4th Cir. 2001) and is reprinted in Appendix A, *infra*.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on September 26, 2001. The jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL STATUTORY PROVISIONS INVOLVED

Title IX of the Education of 1972, 20 U.S.C. § 1681(a) provides, in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal assistance . . . *Id.*

STATEMENT OF THE CASE

In March, 1990, Steven Leckie, a former student at Charles Barrett Elementary School [hereinafter referred to as "Barrett Elementary"][1] went to the school and reported to the Principal, Catherine Malone, that a teacher under her supervision, Craig Lawson, was a pedophile and that Mr. Lawson had sexually molested him as a sixth grade student at the school. (R. 5, 18.)[2] Mr. Leckie testified that he told Ms. Malone "I was there to make her aware to open her eyes, I mentioned that one of the things she might look for is [Mr. Lawson] spending . . . extra time with another student or perhaps giving him rides home as he did with me." (R. 23.)

Principal Malone did not take any notes during the discussion and Mr. Leckie "certainly wasn't encouraged [by Principal Malone] to go into any detail."[3] (R. 19, 20.) Instead, Principal Malone indicated that "this was [his] word against Lawson's . . . there really wasn't much she could do" if Mr. Leckie was not going to file a police report. (R. 21.) Indeed, Principal Malone did nothing with the report. This was the first of several notices to Principal Malone that Mr. Lawson was a pedophile.

The next day, Mr. Leckie's mother, Margaret Leckie, spoke with Principal Malone and confirmed her son's story that he had been molested 15 years earlier by Mr. Lawson

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1. Charles Barrett Elementary School was under the control of the Alexandria City School Board at all times relevant to this action.

2. At the time of this report, Mr. Leckie was a 28-year-old Middle School teacher in Virginia. (R. 5.)

3. Had Principal Malone questioned either Mr. Leckie or his mother further she would have learned Mr. Lawson had sexually molested Mr. Leckie approximately 50 times extending over more than a year, at school, on camping trips and at home. (R. 12-13.)

while Mr. Leckie was a student at the school. (R. 47.) Again, Principal Malone did not ask Ms. Leckie for any details nor did she prolong the conversation in any way. (R. 47-48.) "She said it was a serious charge . . . beyond that, there wasn't much discussion." (R. 48.) Ms. Malone did not indicate that there would be any follow-up to either Mr. Leckie's report or to his mother's corroboration. (R. 49.)

Following the reports by Mr. Leckie and his mother but during the same semester (Spring, 1990), Principal Malone received a third report that Mr. Lawson is a pedophile. (R. 63-66.) During an "Academic Bowl" competition, a tall blonde, or fair-haired woman reported to Harriet Beckman, a teacher at Barrett Elementary, that Mr. Lawson "had abused someone she knew." (R. 64.) Ms. Beckman was alarmed by the report and immediately "brought her to Ms. Malone and said 'she wants to talk to you about Mr. Lawson or something to that effect." (R. 65-66.) The identity of this tall, blonde woman is unknown, as Principal Malone took no notes concerning this report or of the person making the report. She also failed to take any action in response to the woman's accusation.

The following semester (Fall, 1990), Jackson Baynard enrolled in Barrett Elementary as a sixth grade student and was placed in Mr. Lawson's class. (R. 241-242.) Within approximately the first month of the semester, Mr. Lawson and Jackson were both in the boys' lavatory urinating when Mr. Lawson "reached over and . . . rubbed [Jackson's] penis and said, '[i]t's nice to meet you. What's your penis's name?' " (R. 243.)[4] Following this initial sexual assault, there were many more sexual contacts by Mr. Lawson which

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4. The school had separate bathrooms for the faculty, but Mr. Lawson frequently used the boys' lavatory as a meeting place to molest Jackson. (R. 246-247.) In fact, Jackson testified that Mr. Lawson "always used [the boys'] bathroom" as far as he knew. (R. 247.)

became more frequent throughout the school year. (R. 248.) Jackson Baynard testified at trial about the sexual molestation he endured at school:

> While we were in the school, some of it would take place in the bathroom, when he'd either rub my penis in the bathroom or he'd talk about it, or I'd go during language arts in the afternoon. When I'd go by his classroom and he'd meet me in the bathroom, there was a lot of hugging, and he'd rub me through my pants, either rub my bottom or rub my penis with my pants on, or it would be in the classroom. (R. 248.)

This molestation within the school occurred "at least once a day after the initial contact" from early October through May. (R. 248.) Also, Jackson and other students would give Mr. Lawson backrubs in the classroom at the end of every school day. (R. 249.) During the school day, Jackson would give Mr. Lawson "lots of hugs . . . jump on his back . . . sit on his lap." (R. 250, 344.) As well, Mr. Lawson was having sexual relations with Jackson after school at his home or at his cabin in the mountains and in other locations throughout the school year continuing until Jackson graduated from high school. (R. 260, 262-263, 265-266.)

In November, 1990, Principal Malone received another report of Mr. Lawson's inappropriate sexual activity. Before school one morning, Lilly Newman, the school librarian, opened the door to Mr. Lawson's classroom and saw:

> Craig [Lawson] was sitting in a chair facing me, and [Jackson] Baynard was sitting on his lap, and Craig had his left arm around Baynard, had his face very close to Baynard as he was whispering to him.
>
> When I walked in, he jumped up immediately and dumped Baynard on the floor. (R. 78.)

Ms. Newman turned around and left the room as Mr. Lawson followed her part of the way down the hallway calling her name. (R. 79.) She recognized immediately that the behavior she had witnessed was inappropriate ("I just didn't think this is anything you would do with a sixth grade boy sitting on your lap") and reported this "lap-sitting incident" almost immediately to Principal Malone. (R. 79, 81, 115.) Again, Principal Malone took no notes concerning this report and never reported it to anyone, nor did she take any action to remedy the situation. (R. 123-127.)

On or about November 12, 1990, — near the date of the "lap-sitting incident" — Principal Malone documented that she had personally witnessed inappropriate physical contact between Mr. Lawson and Jackson on numerous occasions. (R. 126.) She "had observed J.B. [Jackson Baynard] *constantly* hanging onto [Mr. Lawson] in the hallway and in class and it was really inappropriate for a sixth grade student." [Emphasis Added.] (R. 126.) Instead of taking remedial action to prevent Mr. Lawson — whom she had been told was a pedophile — from further inappropriate contact with Jackson, she left it to Mr. Lawson to counsel Jackson about his behavior: "Craig . . . agreed to talk to J.B. immediately. He agreed that the student should not be so physical and that he would handle it." (R. 126.)

In the Fall of 1990, Ken and Pat Anderson were distraught to learn that Craig Lawson was teaching at Barrett Elementary again. (R. 221-223.) The Andersons were friends of the Leckie family and recalled that Mr. Lawson had sexually abused Steven Leckie 15 years earlier. (R. 219.) They resolved to contact the Principal and bring Mr. Lawson's past to her attention.

Mr. Anderson spoke to Principal Malone about Mr. Lawson. (R. 230, 232.) He informed her of the child sexual abuse allegations against Mr. Lawson. *Id.* He told

Principal Malone "I had learned that . . . Lawson was back in the school, and that caused me great pain, and I implored her to do whatever she could to find out what the true facts were regarding this guy." (R. 230.) Principal Malone took no action.

During this time period, Pat Anderson contacted Rosemary Herman, a friend and long-time teacher at Barrett Elementary, and reported the allegations of child sexual assault about Mr. Lawson. (R. 232, 527, 532.) Believing these allegations to be serious, Ms. Herman met with Principal Malone to report the allegations.[5] (R. 534, 535.) Principal Malone responded that "she couldn't tell me [Ms. Herman] not to say anything about this, *because it was out in the neighborhood.*" [Emphasis Added.] (R. 534.)[6]

Presumably, because the matter "was out in the neighborhood," Principal Malone contacted the Superintendent's Office on January 3, 1991. This report came ten months after Principal Malone first learned of the allegations of sexual abuse from Steven Leckie and his mother (R. 23, 47), and after later having heard allegations of pedophilia or inappropriate contact by Mr. Lawson from Ms. Newman (the school librarian), Mr. Anderson, Ms. Herman, and a tall, blonde woman as well as having witnessed inappropriate contact, herself, between Mr. Lawson and Jackson on numerous occasions. (R. 81, 115, 126, 230.)

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5. Ms. Herman's report to Principal Malone was in accordance with Alexandria Pub. Sch., *Child Abuse and Neglect*, Regulation File 2107-R (July 15, 1981) which requires teachers to report suspected child abuse to the principal, and Alexandria Pub. Sch, *Health and Safety of Pupils*, Policy File 2104 (Mar. 19, 1986) directing teachers to notify the principal of dangerous conditions in the classroom.

6. After notification of dangerous conditions or suspected child abuse, the principal must then report these incidents to the division superintendent, the student's parents, and the police. *See* Va. Code Ann. §§ 22.1-279.3:1(C), (D); 8 Va. Admin. Code § 20-560-10.

In her report, Principal Malone failed to disclose the "lap-sitting" incident between Jackson and Mr. Lawson. (R. 125, 127.) Assistant Superintendent Otto "Dutch" Beckoff, who was head of personnel in the school system at the time, commented on Principal Malone's long delay in reporting the allegations of pedophilia in stating: "I believe the obligation to report is there." (R. 157.) "I was disappointed. I thought it was a lengthy period of time." (R. 156.)

In January, 1991, Mr. Beckoff conducted an investigation and contacted the police who also investigated the matter. In a conversation among Superintendent Paul Masem, Mr. Beckoff, and Principal Malone they agreed that Principal Malone needed to closely monitor Mr. Lawson. (R. 128-129.) While Principal Malone testified that she attempted to keep an eye on him, Jackson Baynard's testimony contradicts her. (R. 130.)

Notwithstanding Ms. Malone's "monitoring" of Mr. Lawson's activities, Mr. Lawson continued to molest Jackson with impunity. Mr. Lawson continued to meet alone with Jackson both before and after school (for about an hour almost every day) as well as in the boys' lavatory nearly every afternoon.[7] (R. 248, 259, 339, 341.) At trial, Jackson described seeing Ms. Malone in her office sitting at her desk as he and Mr. Lawson would walk out of the building together to Mr. Lawson's car. (R. 342.) This was precisely the activity that Steven Leckie had warned her about. (R. 23.)

Principal Malone, by Virginia law, was invested with substantial authority over the operation of Barrett Elementary,

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7. At trial, Jackson testified that nearly every afternoon he would leave his English class and cough outside Mr. Lawson's classroom as a signal for Mr. Lawson to meet him in the boys' bathroom. This became so routine that "even the other students recognized it." (R. 342.)

including, authority over its teachers.[8] She was also responsible for the safety of the students. At the time of the events alleged in the present case, complaints of child abuse were to be reported to the Principal immediately and Principal Malone was required by statute to report those incidents to the student's parents, the division superintendent and police. (*See* n.5 and 6.) Neither Principal Malone nor anyone else had the power to terminate Mr. Lawson. He was a tenured teacher at that time who had a property interest in his job and was entitled to a hearing before any adverse employment action could take place. (R. 198.) However, there were a myriad of other remedies available to her which she declined to take.

Her efforts to closely monitor Mr. Lawson, as stated above, were ineffectual and perhaps non-existent. In addition, she never spoke with any teachers, students, or anyone else in the community. (R. 134.) She never considered reporting to Jackson's parents that allegations had been made of improper sexual conduct by Mr. Lawson and that she had seen and heard about Mr. Lawson engaging in inappropriate contact with their child on more than one occasion. (R. 134.)

While Principal Malone was aware that Mr. Lawson took boys on camping trips without other adults present, she never told Mr. Lawson that he should not take boys camping (particularly without other adults present). (R. 135-136.) Near the end of the school year, Mr. Lawson was allowed to chaperone a school-sponsored pool party where he molested Jackson in the changing room, although she could have prevented this. (R. 372.) Principal Malone never told Mr. Lawson to stop hugging children during the day, or stop getting back rubs from his students. In fact, Principal Malone

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8. Va. Code § 22.1-293 states, in pertinent part, that the school board employs a principal who "shall be responsible for the administration of and shall supervise the operation and management of the school." *Id.*

never directed him to stop seeing children outside of school even though she was aware that this was occurring. (R. 136.) As Principal, all of these remedial actions were available to her and she declined to institute any of them.

The investigation conducted by Mr. Beckoff along with the Alexandria Police Department failed to yield evidence sufficient to prosecute Mr. Lawson criminally. (R. 202-203.) Mr. Leckie had cooperated in the investigation by attempting to place telephone calls to Mr. Lawson while the police tapped the call, but the investigation ground to a halt when he refused to confront Mr. Lawson wearing a hidden microphone. (R. 24, 196.) By March, both Detective Ronald Snuffer of the Alexandria Police Department and Mr. Beckoff concluded that Mr. Lawson had probably molested Steven Leckie and perhaps others. (R. 179,181,182,201.) Yet at that point, Mr. Lawson was never limited in any manner in his dealings with students, nor were any parents informed of the allegations against Mr. Lawson. Instead, Mr. Lawson was allowed to leave the school system voluntarily at the end of the year. (R. 186-189.)

By the end of the school year, Mr. Lawson had become a trusted friend of the Baynard family. (R. 395.) After Christmas, 1990, Jackson was allowed to go on skiing trips alone with Mr. Lawson to his cabin. (R. 397) Wendy Baynard, Jackson's mother, testified that she had no knowledge that Mr. Lawson had been accused of molesting a child, or inappropriate contact with her son. (R. 430.)

Mr. Lawson continued to be a close family friend for many years after he left the school system. Throughout Jackson's junior high school and high school years, Mr. Lawson continued to sexually abuse him. It was not until he reached college that Jackson finally put an end to the abuse by reporting the matter to the police and participating in a wiretap operation which led to Mr. Lawson's arrest and conviction.

The procedural background of this case is as follows: Jackson Baynard brought this action in the United States District Court for Eastern District of Virginia pursuant to 42 U.S.C. § 1983 (West Supp. 2000) against Principal Catherine Malone, Assistant Superintendent Otto "Dutch" Beckoff and Superintendent Paul Masem and against the Alexandria City School Board ["ACSB"] pursuant to Title IX of the Education Amendments of 1972 *see* 20 U.S.C.A. § 1681-88 (West 2000). Defendants Masem and Beckoff were dismissed as parties following the close of plaintiff's case upon defendants' motion for directed verdict. Defendants Malone and ACSB's motions for directed verdict were denied.

A jury returned a verdict in favor of plaintiff against ACSB in the amount of $700,000 and Defendant Malone in the amount of $350,000. Attorneys' fees pursuant to 42 U.S.C. § 1983 were awarded to plaintiff in the amount of $265,000 against Defendant Malone. Following the jury's verdict, the trial judge granted defendant ACSB's motion for judgment notwithstanding the verdict and denied Defendant Malone's motion for judgment notwithstanding the verdict. *See* Appendix A.

Plaintiff appealed the trial court's grant of defendant ACSB's motion of judgment notwithstanding the verdict as well as the trial court's directed verdicts in favor of Defendants' Masem and Beckoff. Defendant Malone cross-appealed the trial court's denial of her motion for judgment notwithstanding the verdict. The appeal was heard by the United States Court of Appeals for the Fourth Circuit which affirmed the trial court's rulings. *See* Appendix B.

Plaintiff seeks a writ of certiorari to this Court limited to the judgment in favor of the ACSB.

REASONS FOR GRANTING THE WRIT

In the case at bar, the Court of Appeals for the Fourth Circuit found the information received by Principal Malone that Mr. Lawson had molested a student previously and was engaged in inappropriate contact with Jackson Baynard (as provided in the Statement of the Case) was insufficient as a matter of law to establish a claim under Title IX. The court held that the principal did not have actual notice of abuse and that even if she did, "no rational jury could find that [Principal] Malone was invested with the power to take corrective action on behalf of the ACSB." *Baynard v. Malone*, 268 F.2d 228 (4th Cir. 2001), attached as Appendix B at 15. Notwithstanding the jury's finding that actual notice to an appropriate person to institute corrective measures did exist, Jackson Baynard's claims were denied. However, the federal courts in other jurisdictions have applied different standards in resolving these issues than the test used in the present case.

The Supreme Court recently summarized the right to sue for damages under Title IX as follows:

> Title IX provides in pertinent part that 'no person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.' 20 U.S.C. § 1681(a). . . . The Court held in *Cannon v. University of Chicago*, 441 U.S. 677, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979), that Title IX is also enforceable through an implied private right of action . . . We subsequently established in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 117 L. Ed. 2d 208, 112 S. Ct. 1028 (1992), that monetary damages are available in the implied private action. *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 286, 141 L. Ed. 2d 694, 118 S. Ct. 1989 (1998).

Because Title IX is remedial in nature, "damages may not be recovered . . . unless an official of the school district who at a minimum has *authority to institute corrective measures* on the district's behalf has *actual notice* of, and is deliberately indifferent to, the teacher's misconduct." [Emphasis Added.] *Id.* at 284. Presently, lower courts have struggled with interpreting what constitutes "actual notice" and who would be an "appropriate authority" to receive such notice. This petition presents these issues for clarification.

A. Judicial procedures are ambiguous in determining what constitutes "actual notice" and who might be an "appropriate person" under Title IX.

Several lower courts have commented that, at present, there exists an ambiguity in determining both "actual notice" and an "appropriate person" under Title IX. In *Gordon v. Ottumwa Community School District*, 115 F. Supp. 2d 1077 (S.D. Me 2000), the court wrote: "it is difficult to define what kind of notice is sufficient" to constitute actual notice. *Id.* at 1082. *See also Frederick v. Simpson College*, 149 F. Supp. 2d 826 (S.D. Iowa 2001) (quoting *Gordon*). Another court commented that "[a]lthough the actual knowledge standard has been applied repeatedly by courts since *Gebser v. Lago Vista Independent School District*, its contours have yet to be fully defined." *Crandell v. New York College of Osteopathic Medicine*, 87 F. Supp. 2d 304, 320 (S.D.N.Y. 2000). The result is a division in the lower courts without a consistent standard for determining actual notice to an appropriate authority. A litigant in one court may prevail where the same facts would be found insufficient as a matter of law in another court. Clarification of these two essential elements is required to provide both consistency in the law and notice to both potential litigants and school districts.

B. Because of judicial ambiguity courts have applied a variety of tests for determining what constitutes "actual notice" of discrimination.

In the absence of a clear test under Title IX to determine "actual notice," some courts have looked to Title VII's prohibition of employment discrimination to provide guidance for determining actual notice. "While little authority discusses this [actual notice] element of the *Gebser* decision, similar issues have been examined in the employment discrimination context." *Massey v. Akron City Board of Education*, 82 F. Supp. 2d 735, 745 (N.D. Oh. 2000) (finding that actual notice exists where there are "facts that indicate a likelihood of discrimination"). However, the Court has noted that applying Title VII principles to Title IX cases is problematic because the statutes have fundamental differences: "whereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds." *Gebser* at 290 *citing Cannon*, *supra*, at 704.

In the present case, the Court of Appeals for the Fourth Circuit held that although the Principal acted with deliberate indifference to constructive knowledge of an unreasonable risk of constitutional harm (which satisfies the elements of the plaintiff's claim under 42 U.S.C. § 1983), there was no actual notice to an appropriate authority which is necessary to sustain a claim under Title IX. Appendix A at 19a. The majority stated, "there is no evidence in the record to support a conclusion that Malone was *in fact* aware that a student was being abused." [Emphasis in original] Appendix B at 14a.

Thus, the Fourth Circuit has adopted a standard for actual notice which "cannot be satisfied by anything less than actual knowledge of current abuse." Appendix at 23a (J. Michael, dissenting.) This standard for determining actual notice

adopted by the Fourth Circuit represents the most stringent end of the spectrum for determining liability in Title IX. Other federal courts have applied different tests for determining what constitutes actual notice under Title IX.

In addressing the issue of what constitutes actual notice, the Court in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 143 L. Ed. 2d 839, 119 S. Ct. 1661 (1999), stated that the "Petitioner may be able to show that the board 'subjected' LaShonda to discrimination by failing to respond in any way over a period of five months to complaints of G.F.'s in-school misconduct from LaShonda and other female students. *Davis v. Monroe Co.* at 649. The Court remanded the case for hearing in concluding that the notices received by the principal were not inadequate to constitute actual notice as a matter of law.

In examining the notices of discrimination received by the principal in *Davis v. Monroe Co.* it seems clear that the Court applied a standard different from the one adopted by the Fourth Circuit for determining actual notice. The complaints which the school board received consisted of the following:

> in December, 1992 . . . G.F. attempted to touch LaShonda's breasts and genital area and made vulgar statements such as 'I want to get in bed with you' and 'I want to feel your boobs.' Similar conduct was alleged to have occurred on or about January 4, and January 20, 1993 . . . Petitioner contacted Fort [her teacher] who allegedly assured petitioner that the school principal, Bill Querry, had been informed of these incidents. *Davis v. Monroe Co.* at 634. . . . [Additionally], petitioner alleges that she spoke with Principal Querry in mid-May, 1993. When petitioner inquired as to what action the school intended to take against G.F., Querry simply stated 'I guess I have to

> threaten him a little bit harder.' [Citations omitted.] *Davis v. Monroe Co.*, at 635.

Thus, the principal is alleged to have received reports from a teacher in January of G.F.'s vulgar behavior and was questioned in May by the petitioner as to what he was going to do about G.F.[9] There is no evidence that the principal witnessed the harassment or that the reports to the principal and circumstantial evidence supporting them were so credible as to constitute actual notice *in fact* as required by the Fourth Circuit.

In the instant case, Principal Malone ignored four reports that Mr. Lawson had sexually molested a student and several instances of inappropriate contact that she witnessed between Mr. Lawson and Jackson as well as the "lap-sitting incident" without taking any action.[10] It would seem to follow that the allegations against Mr. Lawson were more serious and compelling than the reports that G.F., a fifth grader, was being vulgar towards a classmate in *Davis v. Monroe Co.* However, the Fourth Circuit found that as a matter of law no actual notice existed in *Baynard* while the Supreme Court concluded that actual notice was an issue of fact on far less compelling evidence. This Court found in *Davis v. Monroe Co.*, *supra*, "[p]etitioner may be able to show that the Board 'subjected'

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9. It should be noted that the Court documented other incidents of alleged harassment by G.F. which were reported to the classroom teacher. Also, a group of female students sought to speak to the principal about G.F.'s behavior but were refused access by another teacher. It is not clear whether the principal was made aware of these reports.

10. Principal Malone finally made a report to the school district after her conversation with Rosemary Herman, a teacher, wherein she concluded that the information could not be kept quiet because it was "out in the neighborhood." (R. 534.) Ms. Herman was the fifth person to tell Principal Malone that Mr. Lawson had sexually molested a student.

LaShonda to discrimination by failing to respond in any way over a period of five months to complaints of G.F.'s in-school misconduct from LaShonda and other female students." *Davis v. Monroe Co.* at 649. Principal Malone failed to respond to the mounting evidence for over ten months and then continued to act indifferently to a situation she considered serious for an additional six months.

"It is difficult to define what kind of notice is sufficient" to determine actual notice under Title IX. *Gordon, supra*, at 1082. At one end of the spectrum is the Fourth Circuit majority rule which requires notice in fact. However, more than one district court has determined that "the standard [for actual notice] . . . does not set the bar so high that a school district is not put on notice until it receives a clearly credible report of sexual abuse from the plaintiff-student." *Id., citing Doe v. School Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 63 (D. Me. 1999). Instead, several district courts have applied a standard which defines actual notice as sufficient evidence to conclude a school employee is a substantial or obvious risk to abuse children. *Id., see also Doe v. School Admin. Dist. No. 19, supra, Massey v. Akron City Bd. of Educ., supra*, at 744. It seems apparent that in the absence of a statutory definition of actual notice, the Supreme Court should fill this important breach instead of allowing each district or circuit court to choose from a variety of definitions to determine whether a cause of action exists under Title IX.

C. Determining who is an appropriate authority to institute remedial measures for purposes of Title IX.

Gebser makes clear that "a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails to adequately respond." *Gebser, supra* at 290. While

a co-worker or teacher was clearly rejected in *Gebser* as an appropriate authority to take remedial action, whether a principal qualifies as an appropriate authority was not discussed.

Several federal courts have noted the lack of direction in *Gebser* in determining who an appropriate authority to take remedial action might be. " '*Gebser* did not discuss who might be an official with such authority.' " *Frederick* at 836 *citing Litman v. George Mason Univ.*, 131 F. Supp. 2d 795 (E.D. Va 2001) *quoting Floyd v. Waiters*, 171 F.3d 1264 (4th Cir. 1999).

> The Court did not go into detail about who would be an appropriate person [to institute remedial measures under Title IX]; it did not need to do so to decide *Gebser*: [because] in *Gebser* no one in the pertinent school district other than the offending teacher himself knew of his misconduct.

Floyd v. Waiters, 171 F. 3d 1264, 1265 (11th Cir. 1999) *citing Gebser, supra*, at 1993. "Neither the Supreme Court nor this court has decided which individuals must have known of allegations of sexual abuse in order to support a finding that the school district had actual notice of discrimination." *Dow v. Dallas Independent School District*, 220 F. 3d 380 (5th Cir. 2000). This lack of a clear definition concerning who might be considered "an appropriate person to institute remedial measures" has left the lower courts to create tests on an *ad hoc* basis with differing results.

One court interpreted *Gebser* to hold that a Principal is an appropriate authority to institute corrective measures. *Warren v. Reading School District*, 82 F. Supp. 2d 395 (E.D. Pa. 2000).

> Although the issue has not been addressed by the Third Circuit, this Court does not believe that the

> Supreme Court's intention in *Gebser* was to exclude a school principal from the list of authorized people whose non-feasance in the face of an allegation of sexual misconduct can lead to school district liability.

Id. The court in *Warren* reasoned that the principal was the offending teacher's supervisor who had the authority to question the teacher and the duty to respond to the complaints of abuse. *Id.*

The court in *Warren* cited *Gebser* to support its finding that a principal is an appropriate person to bind the school district:

> The Court in *Gebser* referred to the principal as an 'official,' and discussed the fact that the information he had received was 'insufficient to alert the principal to the possibility that [the offending teacher] was involved in a sexual relationship . . .' [t]his discussion would not have been necessary if the principal's actual knowledge would not have satisfied the standard set out by the Court.

Id. at 397, *citing Gebser* at 292. Another court found *Gebser* unclear on who might be an appropriate authority so that knowledge might be attributed to the school board. "While *Gebser* precludes a damages recovery based upon the imputation of knowledge to a school district, the Supreme Court did not hold that liability must be predicated upon actual notice to the school board or superintendent. Rather, liability could attach upon notice to an 'appropriate person.' " *Davis v. DeKalb County School District*, 2333 F.3d 1367, 1372 (8th Cir. 2000).

i. The "Hire and Fire Test" for determining an appropriate official.

Meanwhile, the Court of Appeals for the Fourth Circuit found in the case at bar that remedial measures must include the power to hire and fire the offending employee for the person on notice to be an appropriate person to bind the school board. In so holding, the Fourth Circuit majority stated that:

> no rational jury could find that [Principal] Malone was invested with the power to take corrective action on behalf of the ACSB. We agree with the Fifth Circuit that whether a supervisory employee may be viewed as the proxy of the school district depends upon whether the district has delegated to that employee the traditional powers of an employer, *e.g.*, the authority to hire and terminate employees. Appendix A at 19a, *citing Rosa H. v. San Elizario Independent School District*, 106 F.3d 648, 660 (5th Cir. 1997).

This reliance on the power to hire and fire is inconsistent with the standard applied in *Warren* and other cases.

The power to hire and fire teachers was critical in the Fourth Circuit's analysis of who might be an appropriate person to receive notice on behalf of the school district for purposes of liability under Title IX. *Id.* The Fourth Circuit has imposed a bright-line rule wherein an appropriate authority to institute corrective measures must have the power to hire and fire the offending teacher (or employee). In the present case, the rule was imposed after a jury determined that Principal Malone had the authority to institute adequate corrective measures.

Placing the Fourth Circuit's "hire and fire test" in the context of this case would produce a result which would

completely insulate the ACSB from liability under Title IX. In Virginia at that time, a tenured teacher could not be fired by any individual but upon notice to the school board and a hearing. According to Assistant Superintendent Otto "Dutch" Beckoff, who was Head of Personnel at the time, Mr. Lawson was a tenured teacher at that time who had a property interest in his job and was entitled to a hearing before any adverse employment action could take place. (R. 198.) Therefore, actual notice of discrimination even to the superintendent of schools would have been insufficient to bind the school board because the superintendent did not have the power to terminate Mr. Lawson. This "hire and fire" test would encourage other school districts to make certain that no one person can hire and fire a teacher so that there would be no person who could affect remedial measures which seems contrary to the goals of Title IX.

In a case decided by the Supreme Court after *Gebser*, the Court implied that a Principal may be an appropriate person to receive actual notice for purposes of liability under Title IX. In *Davis v. Monroe Co.*, *supra*, the Court declined to analyze whether the Principal had the authority to expel the offending student. The case was remanded for hearing on the issue of the school board's liability without discussion of whether the Principal might have power to expel the student. The Court's analysis of facts sufficient to support a conclusion that the principal may have been deliberately indifferent would have been superfluous if the Principal was not presumed to be an appropriate authority to institute remedial measures on behalf of the school district.

Also, the reports in *Davis v. Monroe Co.* were made to a teacher or the Principal. However, the Court's discussion of the case consistently refers to the reports to the Principal as notice to the school board. "Here, Petitioner attempts to hold the *board* liable for its own decision to remain idle in the face of known student-on-student harassment." [Emphasis

Added.] *Davis v. Monroe Co.* at 641. Also, "petitioner may be able to show that the *board* subjected LaShonda to discrimination." [Emphasis Added.] *Id.* at 649. In each instance, "the board" refers to the school principal.

The Court of Appeals for the Eighth Circuit in *Kinman v. Omaha Public School District*, 171 F.3d 607 (8th Cir. 1999) took a more moderate approach then the Fourth Circuit finding that the *initiation* of termination proceedings by in reporting the sexual abuse to the school board constitutes sufficient remedial action. *Id.* Principal Robert Whitehall learned of allegations of a sexual relationship between a student and a teacher notified the school district and removed the student from the teacher's study hall which temporarily ended the relationship. *Id.* at 608.

The Principal in the present case could have made a report to the School Board, she could have removed Jackson from Mr. Lawson's class, contacted Jackson's parents, told Mr. Lawson to have no contact with students outside of class, or contacted the Superintendent to initiate termination proceedings in a timely manner. Indeed, the principal is required to do so under Virginia law. A reasonable jury could — and did — find that there were sufficient remedial actions available other than firing the teacher.[11]

Given the goals of Title IX which are to create a remedy for sex discrimination in schools receiving federal funding, it seems that a school principal would be an appropriate authority to receive notice so that the discrimination could

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11. It should be noted that terminating the teacher's employment in this case was not sufficient remedial action because the sexual harassment continued for six years after Mr. Lawson left the school system. Transferring or suspending the teacher would likely have yielded the same results. The jury could have determined that contacting Jackson's parents was an appropriate remedial measure available to the principal.

be cured. The principal is the person vested with the responsibility of supervising the school's operation and its employees. Virginia Code § 22.1-293, states in pertinent part, that the school board employs a principal who "shall be responsible for the administration of and shall *supervise* the operation and management of the school . . ." *Id.*, *see also Lentz v. Morris*, 236 Va. 78, 372 S.E.2d 608 (1988). Moreover, she is the school board's designee to manage the school and receive notice of child abuse. Virginia Supreme Court cases have found that the principal is the "duly authorized agent of the school board" required "to look out for the safety of the students [and] to supervise the entire operation of the school." *Pleasants v. Commonwealth of Virginia*, 214 Va. 646, 203 S.E.2d 114 (1974). "The principal is, for his [or her] school, essentially a counterpart of the superintendent . . . the function is very similar. *Banks v. Sellers, et al.*, 224 Va. 168, 294 S.E.2d 862 (1982) *citing* Va. Code § 22.1-293 (1980 and Supp. 1982) and Code § 22.1-277 (1980). If the school district's superintendent qualifies as a person with authority to institute remedial measures, then it would seem that in Virginia — where a school principal possesses similar supervisory authority within his or her school — the principal should also be an appropriate authority to take remedial action.

ii. Notice to a designated employee standard.

In *Massey v. Akron City Board of Education*, 82 F. Supp. 2d 735 (N.D. Ohio 2000), the court found that "a school also receives notice [of discrimination] when notice is given to any employee whom the school has designated to respond to harassment complaints. The court cited cases which apply this standard in the employment discrimination context." [Citations omitted.] *Id.* at 744 n.7. This notice to a designated employee at the school would eliminate the potential that school districts would seek to immunize themselves from liability under Title IX by not having any person authorized

to take remedial measures. In the present case, the Virginia Code made the school principal the person designated to receive reports of child abuse at the school and required her to take action by reporting the allegations. (*See* n.5 and 6.)

Another court adopted a similar approach to determining who an appropriate authority to institute remedial measure might be. In *Morlock v. West Central Education District*, 46 F. Supp. 2d 892 (6th Dist. Minn. 1999), the court found that the school district's written policy manual designated the building principal as responsible for receiving complaints under the district's sexual harassment conduct policy.[12] As such, she was an official with the authority to take steps to prevent sexual harassment. *Id.* at 909-910. The court concluded that "as a 'building principal' [she was] responsible for complaints under the WCED's sexual harassment conduct policy. For these reasons, plaintiff easily meets the burden of demonstrating that officials with the authority to act had actual knowledge of the students' harassing behavior at the MALC." *Id.* at 909.

As in the present case, the court in *Morlock* addressed the issue of whether student expulsion (the functional equivalent to termination of a teacher) was necessary to vest a person with remedial authority for purposes of Title IX. The fact that state law restricted the principal's authority to expel the harassing students (as many were classified as having behavior disorders) was merely considered a factor to be considered in the range of remedial measures available. *Id.* at 909-910. "Another 'special needs' area learning center . . . , according to its director, similar misconduct would have been much more severely disciplined." *Id.* at 910.

Determining whether a person has authority to institute remedial measures calls for a test which should be clear and uniformly applied. Presently, courts have looked to whether the

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12. The principal was also the "Title IX coordinator" at the school. *Id.* at 909.

person with notice of the discrimination could have terminated the employee, supervised the employee, had a duty to report the discrimination, or whether the person was in a position designated to receive such complaints. Inconsistent outcomes arise from the application of these various tests to the same factual circumstances. The Court should provide a clear statement on who might be considered an appropriate person to institute remedial action.

CONCLUSION

A vivid illustration of the confusion that presently reigns in determining an appropriate standard for actual notice under Title IX has been demonstrated in the case at bar. At trial, Judge Leonie Brinkema instructed the jurors that:

> "actual notice" means such notice as is positively proved to have been given to a party directly and personally or such notice as the party is presumed to have received personally because the evidence within her knowledge was sufficient to put her upon inquiry, and that term, to be put upon inquiry, means that it puts a reasonable person on notice that they need to inquire. (Record extract from March 9, 2001 at 17.)

This standard imposes actual notice where a party is aware of such facts that a reasonable person is on notice of a need to inquire.[13]

However, the Fourth Circuit's majority opinion that held an actual notice *in fact* standard applied in this case. Appendix A at 19a ("there is no evidence in the record to support a conclusion that Malone was *in fact* aware that a student was

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13. The trial court's Order granting ACSB's motion for judgment notwithstanding the verdict did not find that actual notice did not exist, but held only that Principal Malone was not an appropriate authority to take corrective measures. Appendix A.

being abused.") [Emphasis in original.] The dissenting judge in the Circuit Court applied the standard set out in *Warren and Gordon, supra*, that "actual notice is met when an appropriate official has actual knowledge *of a substantial risk of abuse.*" [Emphasis supplied.] Appendix B at 19. Thus, out of four judges who have considered this case, three different standards for determining actual notice have emerged. Consider, as well, the various tests applied by other federal courts as outlined above in interpreting Title IX in the wake of *Gebser*.

This Court has held that Title IX contains an implied right of private action to enforce the legislative intent to remedy instances of sex discrimination in educational institutions receiving federal funding. *See Gebser, supra, at 286 citing Franklin v. Gwinnett County Public Schools, supra.* Several courts have commented that *Gebser* "did not address who might be an official with the authority to institute corrective measures for purposes of Title IX liability against the school district," including the trial court in the instant case. Appendix B at 48a. As previously noted, the lack of a clear standard for determining who might be an appropriate authority to institute remedial measures has led to an *ad hoc* determination which differs depending on the venue where the case is heard.

Certainly, petitioners who seek judicial relief from alleged sex discrimination including sexual molestation, like the petitioner in the case at bar, as well as school districts defending such claims should be able to look to the judiciary for a fair and consistent standard in determining liability. At present, the definitions of two essential elements in determining liability under Title IX do not exist in any clear and consistent manner. The Court should grant this petition for writ of certiorari so that in this relatively new area of litigation the rights and responsibilities of affected partes are more clearly defined.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND DECIDED SEPTEMBER 26, 2001, AS AMENDED OCTOBER 19, 2001

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 00-2340

JACKSON BAYNARD,

Plaintiff-Appellee,

v.

CATHERINE MALONE, former principal of the Charles Barrett Elementary School,

Defendant-Appellant,

and

CRAIG J. LAWSON; ALEXANDRIA CITY SCHOOL BOARD, a body corporate; PAUL MASEM, individually and in his official capacity as former Superintendent of Schools, Alexandria City Public Schools; O.F. DUTCH BECKHOFF, individually and in his official capacity as former Assistant Superintendent of Alexandria City Public Schools; MAXINE J. WOOD, individually and in her official capacity as Assistant Superintendent of Alexandria City Public Schools; SPORTS INTERNATIONAL, INCORPORATED, a Maryland corporation; CONWAY SCHOOL BOARD, a New Hampshire regional school board; ROBERT KAUTZ, individually and in his official capacity as former Superintendent of Conway School Board,

Defendants.

Appendix A

No. 00-2341

JACKSON BAYNARD,

Plaintiff-Appellant,

v.

ALEXANDRIA CITY SCHOOL BOARD, a body corporate; PAUL MASEM, individually and in his official capacity as former Superintendent of Schools, Alexandria City Public Schools; O.F. DUTCH BECKHOFF, individually and in his official capacity as former Assistant Superintendent of Alexandria City Public Schools,

Defendants-Appellees,

and

CATHERINE MALONE, former principal of the Charles Barrett Elementary School; CRAIG J. LAWSON; MAXINE J. WOOD, individually and in her official capacity as Assistant Superintendent of Alexandria City Public Schools; SPORTS INTERNATIONAL, INCORPORATED, a Maryland corporation; CONWAY SCHOOL BOARD, a New Hampshire regional school board; ROBERT KAUTZ, individually and in his official capacity as former Superintendent of Conway School Board,

Defendants.

Appendix A

No. 00-2568

JACKSON BAYNARD,

Plaintiff-Appellee,

v.

CATHERINE MALONE, former principal of the Charles Barrett Elementary School,

Defendant-Appellant,

and

CRAIG J. LAWSON; ALEXANDRIA CITY SCHOOL BOARD, a body corporate; PAUL MASEM, individually and in his official capacity as former Superintendent of Schools, Alexandria City Public Schools; O.F. DUTCH BECKHOFF, individually and in his official capacity as former Assistant Superintendent of Alexandria City Public Schools; MAXINE J. WOOD, individually and in her official capacity as Assistant Superintendent of Alexandria City Public Schools; SPORTS INTERNATIONAL, INCORPORATED, a Maryland corporation; CONWAY SCHOOL BOARD, a New Hampshire regional school board; ROBERT KAUTZ, individually and in his official capacity as former Superintendent of Conway School Board,

Defendants.

Appendix A

No. 00-2569

JACKSON BAYNARD,

Plaintiff-Appellant,

v.

CATHERINE MALONE, former principal of the Charles Barrett Elementary School; ALEXANDRIA CITY SCHOOL BOARD, a body corporate; PAUL MASEM, individually and in his official capacity as former Superintendent of Schools, Alexandria City Public Schools; O.F. DUTCH BECKHOFF, individually and in his official capacity as former Assistant Superintendent of Alexandria City Public Schools,

Defendants-Appellees,

and

CRAIG J. LAWSON; MAXINE J. WOOD, individually and in her official capacity as Assistant Superintendent of Alexandria City Public Schools; SPORTS INTERNATIONAL, INCORPORATED, a Maryland corporation; CONWAY SCHOOL BOARD, a New Hampshire regional school board; ROBERT KAUTZ, individually and in his official capacity as former Superintendent of Conway School Board,

Defendants.

Appendix A

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Leonie M. Brinkema, District Judge.
(CA-99-621-A)

Argued: June 6, 2001

Decided: Sept. 26, 2001

Before WILKINS and MICHAEL, Circuit Judges, and Irene M. KEELEY, Chief United States District Judge for the Northern District of West Virginia, sitting by designation.

Affirmed by published opinion. Judge Wilkins wrote the majority opinion, in which Chief Judge Keeley joined. Judge Michael wrote an opinion concurring in part and dissenting in part.

* * *

OPINION

WILKINS, Circuit Judge:

Jackson Baynard brought this action pursuant to 42 U.S.C.A. § 1983 (West Supp. 2000) and Title IX of the Education Amendments of 1972, *see* 20 U.S.C.A. §§ 1681-88 (West 2000), against Catherine Malone, Otto Beckhoff, Paul Masem, and the Alexandria City School Board ("the ACSB"). Malone appeals an order of the district court denying her motion for judgment as a matter of law. *See* Fed. R. Civ. P. 50. Baynard cross-appeals orders of the

district court granting judgment as a matter of law to Beckhoff, Masem, and the ACSB. We affirm all rulings of the district court.

I.

Prior to and during the 1990-91 school year, Craig J. Lawson was employed by the ACSB as a sixth-grade teacher at Charles Barrett Elementary School, where Malone was the principal.[1] In March 1990, a former student of Lawson's, Steven Leckie, met with Malone and informed her that he had been sexually molested by Lawson when he (Leckie) was a sixth-grade student, some 15 years earlier. Leckie warned Malone that Lawson was a pedophile and advised her to watch out for certain behavior by Lawson, such as spending extra time with a student. Leckie stated, however, that he was not interested in pressing charges against Lawson. The following day, Leckie's mother telephoned Malone and confirmed her son's story. Malone took no action after receiving this information and did not relay the information to anyone. She did not report the alleged incident to Child Protective Services (CPS) because of Leckie's unwillingness to become involved in a police investigation. Later that spring, an unidentified woman informed Malone during a school function that Lawson had sexually molested a student. Malone did not take the woman's name or make any record of this conversation.

In the fall of 1990, Baynard transferred to Charles Barrett Elementary and was assigned to Lawson's classroom. Lawson

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1. Lawson is not a party to this appeal.

began to molest Baynard almost immediately, and the abuse continued until Baynard entered college. The abuse occurred on school grounds before, during, and after school hours; Lawson also abused Baynard during camping trips and at Lawson's home.

In November 1990, the school librarian, Lillian Newman, visited Lawson's classroom before school hours and observed Baynard sitting on Lawson's lap ("the lap-sitting incident"). Lawson's arm was around Baynard's shoulders, and their faces were very close together. When Lawson saw Newman he jumped up, spilling Baynard to the floor. Newman thought the behavior was inappropriate and related the incident to Malone later that morning. Malone spoke with Lawson, who apparently convinced her that what Newman had observed was an innocent "father-son chat." J.A. 166. Malone advised Lawson that she had observed excessive physical contact between Baynard and Lawson, which she characterized as being initiated by Baynard. Malone counseled Lawson to limit physical contact with students, and Lawson promised to admonish Baynard to behave more appropriately. Malone took no further action at that time.

Between Thanksgiving and Christmas, a teacher at Barrett, Rosemary Herman, reported to Malone that a neighbor had informed her that Lawson abused children. Malone responded that "she couldn't tell [Herman] not to say anything about this, because it was out in the neighborhood." *Id.* at 368. According to Malone's testimony, it was not until this point that she perceived a danger to Lawson's students. In January 1991, she contacted Beckhoff, the ACSB's personnel director. Malone told Beckhoff about

the accusation made by Leckie in March 1990 and Herman's report and informed Beckhoff that Lawson was very physical with the students. However, Malone did not mention Baynard or tell Beckhoff about the lap-sitting incident.

Beckhoff immediately began an investigation. He instructed Malone to keep records of any and all complaints from parents and to monitor Lawson's activities. Malone complied with the latter request by walking the halls of the school several times a day, being sure to stop at Lawson's classroom. She also tried to watch Lawson at recess and observed his interactions with students. Although Baynard often stayed after school with Lawson — sometimes for as long as one and one-half hours — and Lawson frequently gave Baynard a ride home, Malone testified that she never observed them together during the course of her monitoring efforts.

Beckhoff's part of the investigation involved interviewing Leckie and his parents and the husband of the neighbor who had spoken to Herman.[2] Beckhoff also examined Lawson's personnel file and contacted Lawson's former school district in New Hampshire. As a result of his investigation, Beckhoff came to believe that Leckie had been abused by Lawson. Beckhoff contacted CPS, which informed him that it could not investigate Leckie's allegations because Leckie was an adult. Beckhoff then involved the Alexandria City Police Department. Leckie cooperated with the police

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2. Beckhoff informed Masem, the superintendent of the ACSB, that the investigation of Lawson was occurring and periodically updated Masem on its progress. Masem took no active role in the investigation.

investigation but refused to initiate a tape-recorded telephone conversation with Lawson. As a result, the investigation was closed for lack of evidence.

Soon after the police investigation was closed, Lawson resigned from Barrett. He nevertheless continued to abuse Baynard until Baynard was a freshman in college. Baynard finally reported the abuse, and Lawson was arrested and convicted.

In April 1999, Baynard brought this action alleging, as is relevant to this appeal, that the ACSB had violated Title IX and that Malone, Beckhoff, and Masem were liable under § 1983. The district court granted judgment as a matter of law to Beckhoff and Masem at the close of the evidence. The jury returned verdicts against the ACSB for $700,000 and against Malone for $350,000. The district court thereafter granted judgment as a matter of law to the ACSB, reasoning that the ACSB could not be held vicariously liable because Malone lacked authority to institute corrective measures against Lawson. *See Baynard v. Lawson*, 112 F. Supp. 2d 524, 531-34 (E.D. Va. 2000). The court denied Malone's motion for judgment as a matter of law, reasoning that a rational jury could conclude from the evidence that Malone was deliberately indifferent to the risk of constitutional injury to Baynard. *See id.* at 529-30.

Malone now appeals, arguing that the district court erred in denying her motion for judgment as a matter of law. Baynard cross-appeals, maintaining that the district court

erred in granting judgment as a matter of law to Beckhoff, Masem, and the ACSB.[3]

II.

We first consider Malone's appeal of the denial of her motion for judgment as a matter of law, which we review de novo, *see Konkel v. Bob Evans Farms Inc.*, 165 F.3d 275, 279 (4th Cir. 1999). We must view the evidence in the light most favorable to Baynard, the nonmovant, and draw all reasonable inferences in his favor without weighing the evidence or assessing the witnesses' credibility. *See Sales v. Grant*, 158 F.3d 768, 775 (4th Cir. 1998). "The question is whether a jury, viewing the evidence in the light most favorable to [Baynard], could have properly reached the conclusion reached by this jury." *Benesh v. Amphenol Corp. (In re Wildewood Litigation)*, 52 F.3d 499, 502 (4th Cir. 1995). We must reverse if a reasonable jury could only rule in favor of Malone; if reasonable minds could differ, we must affirm. *See Sales*, 158 F.3d at 775; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (explaining that judgment as a matter of law is proper if "there can be but one reasonable conclusion as to the verdict").

There is no dispute concerning the legal standards that govern Baynard's § 1983 claim against Malone. It is well settled that "supervisory officials may be held liable in certain circumstances for the constitutional injuries inflicted by their

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3. Baynard also makes a conclusory argument that he was entitled to a larger award of attorneys' fees from Malone. We reject this claim without further discussion.

subordinates."[4] *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994). Such liability is not based on ordinary principles of *respondeat superior*, but rather is premised on "a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict on those committed to their care." *Slakan v. Porter*, 737 F.2d 368, 372 (4th Cir. 1984). In order to establish supervisory liability under § 1983, a plaintiff must demonstrate:

> (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices[ ]; and (3) that there was an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.

Shaw, 13 F.3d at 799 (internal quotation marks omitted).

Malone first argues that there is no evidence to support a conclusion that she had actual or constructive knowledge of a risk to Lawson's students.[5] We disagree. By the end of

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4. There is no dispute that the molestation of Baynard by Lawson was a "constitutional injury."

5. Malone argues primarily that she was not deliberately (Cont'd)

1990, Malone knew that Leckie claimed to have been abused by Lawson; that Newman had observed Baynard sitting on Lawson's lap in a manner Newman believed to be inappropriate; that Lawson was very physical with his students, often putting his arm around them in the halls; and that Lawson frequently took male students on camping trips at which no other adults were present. Malone argues that all of these facts, except the report from Leckie, are subject to benign interpretation. While this is true, it is also beside the point. A reasonable jury could conclude from the evidence presented that the conduct of which Malone was aware provided her with at least constructive knowledge of an unreasonable risk of constitutional injury to Lawson's students.

Malone next maintains that her actions toward Lawson, although inadequate to prevent or stop the abuse of Baynard, did not evince deliberate indifference to the risk of constitutional injury to Lawson's students. "Deliberate indifference is a very high standard — a showing of mere negligence will not meet it." *Grayson v. Peed*, 195 F.3d 692, 695 (4th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000); *see Farmer v. Brennan*, 511 U.S. 825, 835 (1994) (explaining that "deliberate indifference describes a state of mind more blameworthy than negligence" but "is satisfied by something

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(Cont'd)
indifferent to a risk of constitutional injury *to Baynard*. However, *Shaw* makes clear that the appropriate inquiry is whether Malone was deliberately indifferent to a risk that Lawson was abusing *any* of his students. *See id.* (noting that the inquiry is whether supervisor was on notice of conduct that posed a risk of constitutional injury "to citizens *like* the plaintiff" (emphasis added)).

less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result"). Actions that in hindsight are "unfortunate" or even "imprudent" will not suffice. *Jones v. Wellham*, 104 F.3d 620, 627 (4th Cir. 1997). Indeed, a supervisory official who responds reasonably to a known risk is not deliberately indifferent even if the harm is not averted. *See Farmer*, 511 U.S. at 844; *Doe v. Dallas Ind. Sch. Dist.*, 153 F.3d 211, 219 (5th Cir. 1998) (concluding that school official who investigated complaint of sexual abuse was not deliberately indifferent even though official erroneously concluded that complaint was baseless).

Based upon the evidence presented at trial, a rational jury could conclude that Malone was deliberately indifferent to the risk that Lawson was abusing his students, particularly Baynard. Even if Malone's response to the initial report from Leckie in the Spring of 1990 was reasonable, a factfinder could reasonably infer that Malone's failure to respond to mounting evidence of potential misconduct by Lawson exhibited deliberate indifference. In particular, Malone's desultory efforts at "monitoring" Lawson support the verdict.[6] Accordingly, we affirm the denial of Malone's motion for judgment as a matter of law.

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6. Additionally, Malone relies on *Jones*, 104 F.3d at 627, for the proposition that no rational jury could find a causal link between her deliberate indifference and the constitutional injury suffered by Baynard. We reject Malone's causation argument on the reasoning of the district court. *See Baynard*, 112 F. Supp. 2d at 529-30.

Appendix A

III.

On cross-appeal, Baynard contends that the district court erred in granting judgment as a matter of law to Beckhoff, Masem, and the ACSB. With respect to Beckhoff and Masem, Baynard contends that the district court erred in concluding that no rational jury could find deliberate indifference. With respect to the ACSB, Baynard maintains that the district court erred in concluding that the ACSB could not be held vicariously liable under Title IX for the deliberate indifference of Malone. We affirm all three rulings.

A.

In light of the evidence detailed above, we have little difficulty in concluding that no rational jury could find that Beckhoff was deliberately indifferent to a risk that Lawson was molesting his students. Beckhoff instituted a thorough investigation immediately upon receiving the report from Malone, during which he interviewed Leckie and others who had raised allegations regarding Lawson's past conduct. Beckhoff further instructed Malone, who was responsible for the day-to-day supervision of Lawson, to closely monitor Lawson and report any incidents or complaints. Importantly, Beckhoff never had any knowledge of the lap-sitting incident.[7]

We likewise affirm the grant of judgment as a matter of law to Masem. As superintendent, it was not Masem's

7. Although Beckhoff was aware that Lawson had been seen walking down the hallway of the school with his arm around Baynard, such practices were common among teachers at that time.

responsibility to conduct the investigation himself. Moreover, since Beckhoff's investigation was adequate, Masem did not act improperly in failing to direct Beckhoff to take some other action.

B.

We next turn to Baynard's claim that the district court erred in granting judgment as a matter of law to the ACSB. As is relevant here, Title IX provides that "[n]o person in the United States shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C.A. § 1681(a). This prohibition encompasses sexual harassment of a student by a teacher and is enforceable through a judicially implied private right of action for damages against a school district. *See Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75-76 (1992). We conclude that the district court correctly held that no rational jury could find in favor of Baynard on his Title IX claim.

1.

Title IX conditions "an offer of funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998). In *Gebser*, the Supreme Court explained that the contractual nature of Title IX requires that a funding recipient have notice that it may be liable for a monetary award, *i.e.*, it must actually be aware of the discrimination and fail to remedy it. *See id.* at 287-88. In other words, a

school district may be held liable under Title IX "only for its own misconduct"; the implied damages remedy is available only when "the funding recipient engages in intentional conduct that violates the clear terms of the statute." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640, 642 (1999).

In accordance with these considerations, the Supreme Court has expressly rejected the use of "principles of *respondeat superior* or constructive notice" for imposing liability on a school district under Title IX. *Gebser*, 524 U.S. at 285. Rather, the Court held in *Gebser* that "a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the [district's] behalf has actual knowledge of discrimination" and is deliberately indifferent to it. *Id.* at 290. As the Fifth Circuit phrased the test in a pre-*Gebser* ruling,

> a school district can be liable for teacher-student sexual harassment under Title IX only if a school official who had actual knowledge of the abuse was invested by the school board with the duty to supervise the employee and the power to take action that would end such abuse and failed to do so.

Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 660 (5th Cir. 1997).

The partial dissent asserts that the standard we apply is too strict and that the notice requirement is satisfied by actual notice of a *substantial risk* of ongoing sexual abuse. *Gebser*

is quite clear, however, that Title IX liability may be imposed only upon a showing that school district officials possessed actual knowledge of the discriminatory conduct in question. *See Gebser*, 524 U.S. at 285 ("[W]e conclude that it would frustrate the purposes of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of *respondeat superior* or constructive notice, *i.e.*, without actual notice to a school district official." (internal quotation marks omitted)); *id.* at 289 (rejecting standard that would allow imposition of liability when "the district had no actual knowledge of the teacher's conduct"); *id.* at 290 (holding that liability may be imposed only when an appropriate school district official possesses "actual knowledge of discrimination").

To the extent there is any doubt about the nature of the actual notice requirement articulated in *Gebser*, it is removed by the subsequent opinion of the Court in *Davis*. In recounting the *Gebser* holding, the *Davis* court stated, "In *Gebser*, we concluded that a recipient of federal education funds may be liable in damages under Title IX where it is deliberately indifferent to *known acts of sexual harassment by a teacher.*" *Davis*, 526 U.S. at 641 (emphasis added). The Court further explained that in *Gebser*,

> we rejected the use of agency principles to impute liability to the district for the misconduct of its teachers. Likewise, we declined the invitation to impose liability under what amounted to a negligence standard — holding the district liable for its failure to react to teacher-student harassment of which it knew or *should have*

> known. Rather, we concluded that the district could be liable for damages only where the district itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of teacher-student harassment *of which it had actual knowledge.*

Davis, 526 U.S. at 642 (citations omitted) (second emphasis added).

2.

We agree with the district court that no rational jury could find the *Gebser* standard satisfied here.[8] In the first place, no rational jury could conclude that Malone — the relevant official for purposes of the ACSB's liability under Title IX — had actual notice that Lawson was abusing one of his students.[9] Although Malone certainly should have been aware of the *potential* for such abuse, and for this reason was

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8. Although the district court and the parties address only the second prong of the *Gebser* standard — whether knowledge of discrimination was possessed by an individual with authority to act for the school district — we conclude that the record also supports affirmance on the "actual notice" prong. *See Republican Party v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) (explaining that "we may affirm a judgment for any reason appearing on the record").

9. We note that a Title IX plaintiff is not required to demonstrate actual knowledge that a particular student was being abused. We believe that the actual notice requirement could have been satisfied, for example, if Malone had had actual knowledge that Lawson was currently abusing one of his students, even without any indication of which student was being abused.

properly held liable under § 1983, there is no evidence in the record to support a conclusion that Malone was *in fact* aware that a student was being abused.

Secondly, no rational jury could find that Malone was invested with the power to take corrective action on behalf of the ACSB. We agree with the Fifth Circuit that whether a supervisory employee may be viewed as the proxy of the school district depends upon whether the district has delegated to that employee the traditional powers of an employer, *e.g.*, the authority to hire and terminate employees. *See Rosa H.*, 106 F.3d at 660. "This inquiry circumscribes those school employees in the chain of command whom the school board has appointed to monitor the conduct of other employees and, as distinguished from reporting to others, remedy the wrongdoing themselves." *Id.*

We agree with the district court that the principal of a public school in Virginia cannot be considered the functional equivalent of the school district. There is no question that a principal in the Virginia school system possesses substantial authority over the school to which he or she is assigned. For example, a principal must "provide instructional leadership," is responsible for the administration of the school, and must supervise its operations and management. Va. Code Ann. § 22.1-293(B) (Michie 2000). Additionally, the principal is responsible for supervising teachers and evaluating employee performance. *See* Va. Code Ann. § 22.1-293(C) (Michie 2000); *Lentz v. Morris*, 372 S.E.2d 608, 610-11 (Va. 1988).

Critically absent from the scope of a principal's authority, however, are the powers that would make a principal the

proxy of the school district: the power to hire, fire, transfer, or suspend teachers. In Virginia, those powers are reserved exclusively to the school district; a principal may only make recommendations regarding such matters. *See* Va. Code Ann. § 22.1-295(A) (Michie 2000) ("The teachers in the public schools of a school division shall be employed and placed in appropriate schools *by the school board* upon recommendation of the division superintendent." (emphasis added)); *id.* § 22.1-293(C) ("A principal may submit *recommendations* to the division superintendent for the appointment, assignment, promotion, transfer and dismissal of all personnel assigned to his supervision." (emphasis added)). Simply put, Virginia has made an explicit policy decision that school principals do not exercise the powers of an employer on behalf of the school district. Because Malone had no independent authority to suspend, reassign, or terminate Lawson, no rational jury could have concluded that her knowledge of ongoing discrimination at Charles Barrett Elementary should be imputed to the ACSB.

IV.

For the reasons set forth above, we conclude that the district court correctly denied Malone's motion for judgment as a matter of law and correctly granted the motions of Beckhoff, Masem, and the ACSB. Accordingly, we affirm.

AFFIRMED.

Appendix A

MICHAEL, Circuit Judge, concurring in part and dissenting in part:

I concur in parts I, II, and III.A. of the majority opinion, but I respectfully dissent from part III.B. The jury's verdict against the school board on Title IX should be reinstated because (1) Malone (the principal) had actual knowledge of a substantial risk of sexual abuse to students in her elementary school and (2) she had the authority to institute corrective measures to eliminate the risk.

Title IX provides that "[n]o person . . . shall, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). A school board receiving federal funds is liable under Title IX if an appropriate official has "actual knowledge of discrimination in the [board's] programs and fails adequately to respond. . . . [T]he [inadequate] response must amount to deliberate indifference to discrimination." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

I.

The majority affirms the grant of judgment as a matter of law to the school board, holding that under *Gebser* "Title IX liability may be imposed only upon a showing that school district officials possessed actual knowledge of the discriminatory conduct in question." *Ante* at 14. The majority explains that "the actual notice requirement [can be] satisfied, for example, if [the appropriate official] had had actual knowledge that [the teacher] was currently abusing one of his students, even without any indication of which student was being abused." *Ante* at 15 n.9. The explanation is a step

in the right direction, but it still means that the actual notice standard is satisfied only if the school board official was aware of current sexual abuse to someone in the student body (not necessarily the eventual plaintiff). This is wrong, I respectfully suggest, because *Gebser* does not require that the appropriate official have actual knowledge of current abuse. Rather, *Gebser* leaves room for an actual notice standard that requires the appropriate official to have actual knowledge of at least a substantial risk of sexual abuse (or discrimination).

Gebser held that a complaint by parents that a teacher "had made inappropriate [sexually suggestive] comments during class . . . was plainly insufficient to alert the principal to the possibility that [the teacher] was involved in a sexual relationship with a student." *Gebser*, 524 U.S. at 291. Thus, while *Gebser* makes clear that the actual notice standard requires more than a complaint about inappropriate remarks, the case does not definitively establish the boundaries of actual notice. By insisting that actual notice cannot be satisfied by anything less than actual knowledge of current abuse, the majority's new standard "set[s] the bar [too] high." *Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 63 (D. Me. 1999).* Under the majority's standard a school board

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* The majority contends that *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), removes any doubt that the actual notice standard requires actual knowledge of current misconduct. *See ante* at 14. I disagree. *Davis*'s primary point is that a school board may be liable under Title IX for student-on-student harassment. And while *Davis* reaffirms *Gebser*'s rejection of the constructive notice and *respondeat superior* theories of liability, *Davis* did not clarify what constitutes actual notice because notice was not at issue. Rather, *Davis* held that a complaint alleging that a school principal had actual knowledge of student-on-student harassment stated a claim.

will escape liability even if an appropriate official knew that a teacher was engaging in behavior that raised warning flags of substantial risk as long as the official did not actually know that the teacher was abusing a student. The majority's standard will also let a school board off the hook if its official knew that a teacher had abused a student in the past as long as the official did not know of any current abuse.

These results, brought about by a notice standard that is too restrictive, are inconsistent with the objectives of Title IX and with the actual notice and deliberate indifference theory of liability recognized by the Supreme Court. First, one of Title IX's principal objectives is to provide effective protection against discriminatory or abusive practices in schools that receive federal funds. *See Gebser*, 524 U.S. at 286. Under Title IX a school board has "a duty not to permit teacher-student [sexual abuse] in its schools." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. at 643 (internal quotations omitted), and this duty is imposed "to induce school boards to adopt and enforce practices that will minimize the danger that vulnerable students will be exposed to such [abuse]," *Gebser*, 524 U.S. at 300 (Stevens, J., dissenting). The majority's notice standard actively undermines Title IX's objectives because it discourages efforts to identify situations of potential abuse. The appropriate official can simply wait until she gains actual knowledge of current abuse. In short, the majority's standard does little to prevent sexual abuse from occurring in the first place, even though prevention is the best way to further Title IX's goal of nondiscrimination. Second, the majority's notice standard — requiring actual knowledge of current abuse — is too restrictive to afford the full measure of protection

intended under *Gebser*'s actual notice and deliberate indifference theory of liability. According to the Supreme Court, "If a funding recipient does not engage in [abuse] directly, it may not be liable for damages unless its deliberate indifference 'subject[s]' its students to [abuse]. That is, the deliberate indifference must, at a minimum, 'cause [students] to undergo' [abuse] *or 'make them liable or vulnerable' to it.*" *Davis*, 526 U.S. at 644-45 (second and fourth alterations in original) (emphasis added) (quoting Random House Dictionary of the English Language 1415 (1966)). Thus, if a board is liable when its official's deliberate indifference makes students vulnerable to abuse, the official's knowledge of that *vulnerability* (or substantial risk) surely satisfies the actual notice standard. Under the majority's theory, however, liability is triggered only if the official had knowledge of *actual* abuse.

The proper boundary for what constitutes actual notice lies somewhere between the one adopted by the majority (actual knowledge of current sexual abuse) and the one rejected by *Gebser* (actual knowledge of sexually suggestive comments in class). I am convinced that the actual notice requirement is met when an appropriate official has actual knowledge of a substantial risk of abuse. An appropriate official has actual knowledge of a substantial risk if she knows of facts indicating a substantial risk and she subjectively believes that the facts signal such a risk. *See Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 659 (5th Cir. 1997). This is not a constructive notice or *respondeat superior* theory, which would impose liability even if the appropriate official had no actual knowledge of anything. Thus, the standard I propose is consistent with

Gebser. The *Gebser* Court was, of course, unwilling to impose liability on school districts that lack any notice of discrimination. "[A] central purpose of requiring notice of the violation . . . is to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs." *Gebser*, 524 U.S. at 289. Actual knowledge of a substantial risk of abuse, however, provides fair and sufficient warning to a school board that it faces potential liability.

My interpretation of what satisfies *Gebser*'s actual notice requirement is consistent with that of district courts that have confronted this question. *See, e.g.*, *Gordon v. Ottumwa Cmty. Sch. Dist.*, 115 F. Supp. 2d 1077, 1082 (S.D. Iowa 2000) (actual notice "does not set the bar so high that a school district is not put on notice until it receives a clearly credible report of sexual abuse from the plaintiff-student. At some point . . . a supervisory school official knows . . . that a school employee is a substantial risk to sexually abuse children.") (internal citations and quotations omitted); *Massey v. Akron City Bd. of Educ.*, 82 F. Supp. 2d 735, 744 (N.D. Ohio 2000) ("For actual notice to exist, an agent of the school must be aware of facts that indicate a likelihood of discrimination."); *Frederick v. Simpson College*, 149 F. Supp. 2d 826, 838 (S.D. Iowa 2001) (actual notice requires "actual notice . . . that [the teacher] was at risk of sexually harassing a student.").

The evidence in this case supports the conclusion that Malone (the principal) actually knew that Lawson (the teacher) posed a substantial risk to the students of Charles Barrett Elementary School. Leckie, one of Lawson's former student-victims, told Malone that he had been sexually

molested by Lawson. Leckie warned Malone to watch out for certain telltale signs, such as whether Lawson was spending extra time with a particular student or giving him rides home. Leckie's mother also talked to Malone and confirmed her son's story. Two other members of the community and a teacher informed Malone that Lawson was a pedophile who had abused students. Malone herself witnessed excessive physical contact between Baynard and Lawson in the hallway at school. Specifically, Malone noticed Baynard "constantly hanging onto" Lawson, and Malone recognized that this behavior was "really inappropriate for a sixth grade student." Finally, Malone was aware of an incident of particularly flagrant behavior involving Lawson and Baynard. Newman, the school librarian, walked into Lawson's classroom one morning before classes began and saw the following: Baynard was sitting on Lawson's lap, Lawson had his arm around Baynard, their faces were almost touching, and Lawson was whispering to Baynard. When Lawson and Baynard saw Newman, an expression of shock crossed their faces. Lawson jumped up immediately, dumping Baynard on the floor. Newman "quickly turned" and walked out of the room. She was upset at what she had seen because "[i]t just didn't look right" and "was inappropriate." Newman "didn't think this is anything you would do with a sixth grade boy sitting on your lap." Newman promptly reported everything she had seen to Malone. This evidence is sufficient to establish "actual notice" under Title IX because the jury could rationally conclude that Malone knew the facts indicating that Lawson was a substantial risk and that she personally understood that risk.

Appendix A

II.

For a school board to be liable under Title IX, there must be actual notice to an "appropriate" official, that is, an official "who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the [school board's] behalf." *Gebser*, 524 U.S. at 290. Even though Malone, as school principal, had supervisory authority over Lawson, the majority concludes that Malone is not an appropriate official because her authority over personnel matters was limited to making recommendations and she "had no independent authority to suspend, reassign, or terminate Lawson." *Ante* at 16. I disagree.

The principal is the highest ranking school official present at the school every day, and she performs many functions on behalf of the school board. *Cf. Banks v. Sellers*, 294 S.E.2d 862, 865 (Va. 1982) (referring to the principal as "essentially a counterpart of the [division] superintendent"); *Pleasants v. Commonwealth*, 203 S.E.2d 114, 116 (Va. 1974) (calling the principal "the duly authorized representative of the school board"). She is "responsible for the administration of and shall supervise the operation and management of the school or schools and property to which [s]he has been assigned." Va. Code Ann. § 22.1-293(B). *See also Banks*, 294 S.E.2d at 865 (noting that the principal "performs a large number of discretional and managerial functions in the school"). The local school board "exercises control and direction over [a teacher] through the school principal." *Lentz v. Morris*, 372 S.E.2d 608, 610 (Va. 1988).

Virginia statutes and regulations assign to the principal the first line of responsibility for ensuring that the students

in her school are safe, particularly from sexual abuse at the hands of their teachers. *Cf. Pleasants*, 203 S.E.2d at 116 (noting that the principal is required to "look out for the safety of the students"). Other school employees and members of the community are expected to report instances of sexual abuse to the principal. *See* Va. Code Ann. § 22.1-279.3:1(A) (designating principal as official to receive reports of sexual assault in school); *see also* Alexandria City Pub. Sch., *Child Abuse and Neglect*, Regulation File 2107-R (July 15, 1981) (directing teachers to notify principal of suspected child abuse); Alexandria City Pub. Sch., *Health and Safety of Pupils*, Policy File 2104 (Mar. 19, 1986) (directing teachers to notify principal of classroom conditions that are dangerous to children). The principal must then report these incidents to the division superintendent, the student's parents, and the police. *See* Va. Code Ann. § 22.1-279.3:1(C), (D); 8 Va. Admin. Code § 20-560-10. In this case six different people reported to Malone, under the assumption that she would implement the necessary measures to make sure Lawson was no longer a threat to the children. Because Malone was the supervisor of the school and the official designated to receive complaints about sexual assaults, the school board should not be able to avoid liability for Malone's deliberate indifference to a known risk of teacher-on-student sexual abuse.

By emphasizing Malone's lack of authority to suspend, terminate, or reassign Lawson, the majority has created an overly narrow concept of an official who has authority "to institute corrective measures." Malone had the duty and authority to implement various measures that would have contributed to preventing or stopping Lawson's abuse of Baynard. For instance, as Lawson's supervisor, Malone could

have confronted Lawson with the reports she had received and ordered him to stop the inappropriate behavior she personally witnessed. *See Warren v. Reading Sch. Dist.*, 82 F. Supp. 2d 395, 399-400 (E.D. Pa. 2000) (holding that principal is an official with authority to institute corrective measures because she has supervisory authority over teachers and the power to question teachers about suspicious behavior). In addition, Malone could have given the division superintendent and the police a prompt and complete report of Lawson's abusive behavior. *See id.* at 399 (concluding that the principal's higher duty to report to appropriate authorities is a corrective measure); *see also Booker v. City of Boston*, No. CIV.A.97-CV 12534MEL, 2000 WL 1868180, at *3 (D. Mass. Dec. 12, 2000) (holding that principal was an official with the authority to end the sexual abuse because he "not only had the authority *but the obligation* to notify [the Department of Social Services]" (emphasis in original)). Other corrective measures that Malone could have taken include notifying Baynard's parents and properly monitoring Lawson according to the instructions of Beckhoff, the personnel director. The appropriate official's authority to "institute corrective measures" does not have to include the authority to suspend or fire. As long as the official possesses the ability and the duty to take meaningful steps toward stopping the abuse, the official's deliberate indifference should translate into school board liability under Title IX. *See Morlock v. W. Cent. Educ. Dist.*, 46 F. Supp. 2d 892, 911 (D. Minn. 1999) (holding that "as the acting principal of the [alternative school program], the school's sexual harassment coordinator and [the harassing teacher's] superior, Fish had the power and the official responsibility to begin the process of addressing plaintiff's complaint" of sexual harassment).

Malone had the authority to initiate steps to prevent or end Lawson's abuse of Baynard.

Under the majority's approach, it appears that the class of appropriate officials will be limited, at least in Virginia, to school board members because only the school board has the power to suspend or terminate a teacher. *See* 8 Va. Admin. Code § 20-90-70. As one court has pointed out, defining the class of appropriate officials so narrowly means that "a school district would virtually never face penalties for sexual abuse of students unless school board members themselves intended the harm. By the same token, victims of abuse would virtually never be able to recover, especially in large school districts, in which school board members have little contact with the day-to-day interactions between teachers and students." *Rosa H.*, 106 F.3d at 659. *Gebser* does not require such a narrow construction. Again, an appropriate official is simply one who "has authority to address the alleged discrimination and to institute corrective measures." *Gebser*, 524 U.S. at 290. Malone, as principal, was in a position to take corrective action.

III.

In sum, the record supports the conclusion that Malone had actual knowledge that Lawson posed a serious risk and that she had the authority (but failed) to institute corrective measures to address this risk. That is sufficient under *Gebser* to hold the school board liable under Title IX. I would therefore reverse the district court's order granting the school board's motion for judgment as a matter of law.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION DATED AND FILED SEPTEMBER 12, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 99-621-A

JACKSON BAYNARD

Plaintiff,

v.

CRAIG J. LAWSON, et al.

Defendants.

MEMORANDUM OPINION

Before the Court are defendant Catherine Malone's ("Malone") Motion for Judgment Notwithstanding the Verdict and defendant Alexandria City School Board's ("ACSB") Motion for Judgment Notwithstanding the Verdict or in the Alternative [for] a New Trial. This action, which was tried before a jury over the course of five days beginning March 6, 2000, was brought by Jackson Baynard, a twenty year-old man, against the ACSB and various school officials for damages resulting from sexual abuse by his sixth grade teacher, Craig J. Lawson, beginning in 1990. After the Court

entered judgment as a matter of law in favor of Paul Masem, the Superintendent of Alexandria City Schools, and Otto Beckhoff, the School District's Director of Personnel, the jury returned a $350,000 verdict against Malone and a $700,000 verdict against the ACSB.

The moving defendants contend that the evidence presented at trial failed, as a matter of law, to support the verdicts reached against Malone and the ACSB, pursuant to Section 1983, 42 U.S.C. § 1983, and Title IX, 20 U.S.C. § 1681(a), respectively.[1] For the reasons stated below, we find that the evidence was sufficient to support a verdict against Malone under Section 1983. However, the ACSB motion requires the Court to closely consider the meaning, for purposes of Title IX, of an official with the authority to institute "corrective measures." Because we find that plaintiff failed to prove, by a preponderance of the evidence, that a school official with the authority to institute corrective measures failed to adequately respond to plaintiff's situation, we grant the ACSB's Motion for Judgment Notwithstanding the Verdict.

I. BACKGROUND

Plaintiff was a student in Lawson's sixth-grade class at the Charles Barrett Elementary School in Alexandria, Virginia, during the 1990-1991 school year. Early that year, Lawson initiated a sexually abusive relationship with plaintiff, which ultimately spanned eight years and

1. Neither party has ordered a transcript of the trial. Therefore, we have relied on our notes of the trial testimony to resolve these motions.

manifested itself in sexual encounters during school in the classroom, bathrooms and hallways; on school grounds before and after school; at Lawson's apartment; at his vacation home; and even in plaintiff's home.

Malone was principal at Barrett during the 1990-1991 school year. At trial, evidence was presented that she was contacted by Steven Lecki, one of Lawson's former students, in March 1990, before plaintiff began attending Barrett. Lecki testified that he told Malone that he had been a student in Lawson's class at Barrett fifteen years earlier, and, during that time, he was sexually molested by Lawson. He also told her that Lawson is a pedophile. Lecki told Malone that he did not want to report the abuse to the police, but that he thought that she should be aware of what happened to him because he did not want it to happen to others. Lecki advised Malone to be aware of whether Lawson was spending extra time with a student, such as giving him rides home. Malone recorded Lecki's name and number, and requested corroboration of his story. His mother, Margaret Lecki, called Malone the next day. Margaret Lecki testified that she told Malone that she knew about Lawson's abuse of her son, that the allegations were true, and that she had known about the abuse since her son told her fifteen years earlier.

Despite this information from the Leckis, Malone took no action. Malone explained that, at the time, she felt it was unnecessary to report the Leckis' allegations to Child Protective Services ("CPS") because she was concerned about the Leckis' credibility and Steven Lecki's unwillingness to cooperate with a police investigation. Malone said she thought it might be an isolated incident and did not think that anybody in the school was in danger.

Appendix B

Lawson remained a sixth grade teacher. For the next school year, 1990-1991, Baynard was assigned to Lawson's classroom. Lawson began sexually molesting Baynard soon thereafter. In November 1990, the school librarian, Lillian Newman, reported to Malone that she had seen Lawson with plaintiff sitting on his lap in Lawson's classroom before school. Specifically, Newman testified that she went to school early one day, and walked into Lawson's classroom to ask him for help in the computer lab. When she arrived at Lawson's room, she observed plaintiff sitting on Lawson's lap. Lawson had his right arm around plaintiff's shoulder, and their faces were very close. Upon seeing Newman, Lawson jumped up suddenly, dumping plaintiff onto the floor. Newman testified that Lawson appeared shocked to see her. She also testified that she thought the "lap-sitting" was inappropriate, and that it did not look right. After the morning announcements, Newman went to Malone's office and reported the lap-sitting incident in detail.

Malone testified that she personally observed a certain "physicalness" between Lawson and his students, and discussed it with Lawson, mentioning plaintiff specifically. With respect to Newman's lap-sitting report, Malone testified that Newman gave more details to the jury than she gave to Malone at the time, although it was clear to Malone from Newman's report that Lawson and plaintiff were very physically close together, and that Newman thought it was inappropriate. The only actions Malone took in response to Newman's report was to meet with Lawson to discuss the lap-sitting incident. She told him that he had been observed behaving inappropriately with plaintiff. Lawson gave Malone the impression of a father-son chat, and, according to Malone,

was open, unembarrassed and convincing. Malone did nothing more.

According to Malone's trial testimony, her suspicions were finally raised sometime between Thanksgiving and Christmas 1990, when a teacher at Barrett, Rosemary Herman, told Malone that a neighbor of hers, Helen Anderson, had called Herman at home to tell her that Lawson had abused children. Malone testified, "this linked things for me," and, in January 1991, she called Maxine Wood, a member of the ACSB, to get advice. Wood suggested that Malone report the situation to Otto Beckhoff, the Executive Director of Personnel of the ACSB. Malone followed this advice and told Beckhoff about the March 1990 report from the Leckis. She also mentioned Herman's report, and that Lawson was very physical with students, often having his arm around them. Inexplicably, Malone did not tell Beckhoff that Newman had seen plaintiff sitting on Lawson's lap.

Beckhoff immediately began an investigation. He had numerous conversations with Malone and asked her to write down any complaints from parents. He also told Malone to monitor Lawson more closely than other staff and to look out for inappropriate behavior. Malone testified that she responded to Beckhoff's direction by walking through the school building several times in the morning and afternoon, that she stopped at Lawson's classroom, that she went into Lawson's classroom when he was not there, that she monitored Lawson at recess and that she tried to be aware of Lawson's interactions with students. However, Malone also testified that she did not have an "official stake-out" program for Lawson. Rather, she had practices already in place that

she thought would be sufficient to monitor him. She did not watch Lawson leave the building every day, although she coincidentally saw him leave about once a week. She testified that she never considered having Lawson removed from the classroom or talking to plaintiff's parents, and that, although she heard that Lawson took students on weekend camping trips, she believed that he had the endorsement of parents to do that, and therefore never told Lawson to stop the trips.

The testimony as to what Malone told Beckhoff about plaintiff is not entirely consistent. Malone testified that she may have told Beckhoff about a student's "clinginess" with Lawson, and her subsequent counseling of Lawson, but she did not know if she mentioned plaintiff's name and did not recall telling Beckhoff about the lap-sitting. Beckhoff testified that Malone gave him a type-written note reporting that she spoke to Lawson. The note did not mention plaintiff by name, but rather, merely used the initials "J.B." Beckhoff testified that it was probably within a few days of receiving the note that Malone told him who "J.B." was. Malone explained to Beckhoff that she saw Lawson putting his arm around plaintiff as they walked down the hall and she was concerned about it, and thus spoke to Lawson. Beckhoff does not remember reporting anything about plaintiff to Paul Masem, the superintendent of Alexandria City Schools, and does not think that he ever did.

Beckhoff's investigation continued until mid-March. He spoke to Steven Lecki and his parents, Ken Anderson (Helen Anderson's husband, who also had expressed concerns to members of the Barrett faculty about Lawson's past), examined Lawson's file, called Lawson's former school

district in New Hampshire and contacted CPS. CPS told Beckhoff that the case was out of its jurisdiction because Lecki was now an adult. Beckhoff testified that by the time he spoke to Lecki's father he believed that Lawson had probably sexually abused Lecki. According to Beckhoff, he focused his investigation on Lecki, and never linked plaintiff to the investigation. His impression from Malone was that she had spoken to Lawson about several items, and that her "counseling" was not just with respect to a particular student. Beckhoff believed that, in the early 1990s, it was not inappropriate for a teacher to walk the halls with his arm draped around a student.

Beckhoff's investigation was transferred to Detective Snuffer of the Alexandria City Police Department. Snuffer conducted his own interviews of the same individuals with whom Beckhoff had spoken, and also interviewed Lawson. Steven Lecki cooperated with Snuffer to a point, but stopped when Snuffer asked him to initiate a tape-recorded telephone conversation with Lawson in order to gather evidence. On March 11, 1991, Snuffer issued a report in which he concluded that the Police Department could not proceed in its investigation because without Lecki's further cooperation or an agreement to testify, there was insufficient evidence against Lawson. The report also reflected Snuffer's conclusion that Lawson probably abused Lecki. Snuffer testified that they never uncovered evidence of other victims. According to Beckhoff, Snuffer spoke to Lawson on at least three occasions. At one point, Lawson agreed to take a lie detector test, but later refused. In April 1991, Lawson tendered his resignation to the ACSB, indicating that he would leave Barrett at the end of the 1990-1991 school year, which he did.

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Plaintiff testified that within a month of beginning sixth grade in Lawson's class, Lawson began paying him sexual attention. Lawson subjected plaintiff to sexual contact in the boys' bathroom and in the classroom on a daily basis. Lawson and plaintiff devised a signal so that Lawson would know when plaintiff was going to the bathroom and could follow him there. The two also began meeting alone before and after school in Lawson's classroom. On the morning visits, plaintiff would enter the school building through a side door once Lawson unlocked it, upon plaintiff's signal. Two to three times a week, plaintiff stayed after school with Lawson, sometimes for as long as one and a half hours. They would then walk out to Lawson's car in the faculty parking lot.

Lawson's sexual abuse of plaintiff persisted throughout the school year, and took place beyond the school building, at Lawson's apartment, his mother's house, his mountain cabin, and even in plaintiff's house. It continued, sometimes sporadically, until plaintiff was a freshman in college. At that point, plaintiff reported the abuse to the police for the first time. He also participated in a sting operation which allowed the police to gather evidence and led to Lawson's arrest and eventual conviction in November 1998.

Plaintiff filed this multi-count, multi-party lawsuit in April 1999. When the trial began, there were two remaining counts against the four remaining defendants. Plaintiff advanced Count I, Title IX, against the ACSB, and alleged that Malone, Wood, Beckhoff, and/ or the Superintendent of Schools, Paul Masem, as officials of the ACSB, failed to address the discrimination against plaintiff on the basis of sex which occurred as a result of the sexual abuse inflicted

by Lawson. According to plaintiff, these officials waited too long to begin an investigation, conducted an inadequate investigation, did not take affirmative steps to protect him once the investigation began, and similarly failed to protect him after the police investigation ended. In Count II, plaintiff sued Malone, Beckhoff and Masem, in their individual and official capacities, under 42 U.S.C. § 1983, alleging that those defendants showed deliberate indifference towards his constitutional rights through the omissions described above.

At the close of plaintiff's case, we entered judgments as a matter of law in favor of Beckhoff and Masem. The jury was then charged with determining whether the ACSB was liable under Title IX and/ or Malone was liable under Section 1983. The jury deliberated for almost two days, and returned a verdict against Malone in the amount of $350,000, and a verdict against the ACSB in the amount of $700,000. Both of these defendants now separately move for judgments in their favor, notwithstanding the verdict.

II. DISCUSSION

Neither defendant challenges how the jury was instructed on the legal standards. However, both defendants challenge the sufficiency of the evidence to support the jury's verdicts. Rule 50(b) of the Federal Rules of Civil Procedure permits litigants to renew motions for judgment as a matter of law within 10 days of a jury verdict. The court may direct entry of judgment as a matter of law if there is "no legally sufficient evidentiary basis for a reasonable jury to find for the party" on an issue. Fed. R. Civ. P. 50(b)(1)(C), 50(a)(1). To resolve the motion, the court must review all of the evidence in the

record and draw all reasonable inferences in favor of the nonmoving party. *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2110 (2000). It may not make credibility determinations or weigh the evidence and must disregard all evidence favorable to the moving party that the jury is not required to believe. *Id.*

A. Defendant Catherine Malone's Motion for Judgment Notwithstanding the Verdict

Malone contends that we should award her judgment notwithstanding the verdict because the evidence presented at trial was insufficient, as a matter of law, to justify any judgment or award against her.[2] In the alternative, Malone requests remittitur.

1. Sufficiency of the Evidence to Demonstrate Deliberate Indifference

Malone correctly cites *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994), for the three elements that must be proven in order to impose supervisory liability under Section 1983:

1. The supervisor had actual or constructive knowledge that her subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury;

2. The supervisor's response was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices; and

---

2. At trial, Malone never raised the defense of qualified immunity.

3. There was an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered.

Malone focuses only on the second, "deliberate indifference" element, to support her argument that the evidence adduced at trial was inadequate to establish liability. She contends that the jury could not have found "deliberate indifference" unless it based that finding on three pieces of evidence: (1) Malone did not report the Leckis' allegations to any higher officials for a period of ten months; (2) Malone's inadequate response to the lap-sitting incident and plaintiff's observed "clinginess" with Lawson; and (3) Malone's failure to increase her monitoring of Lawson once the school's investigation began.

The parties did not object to the Court's jury instruction on deliberate indifference at trial, nor do they challenge the instruction now. The jury was instructed that to establish that Malone acted with deliberate indifference, plaintiff had to prove that Malone acted with a reckless disregard to a known risk by showing that (1) Malone knew, or that a reasonable person in her position would have known, that Lawson posed a substantial risk of constitutional injury to students like the plaintiff, and (2) despite such knowledge, Malone acted recklessly by disregarding that known substantial risk. The jury was further instructed that deliberate indifference is a high standard, and that a showing of mere negligence will not suffice. That is, mere errors in judgment, sloppiness, or ineffective actions, even if they result in unfortunate consequences, do not constitute deliberate indifference.

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Malone argues that the delay between the Leckis' report of Lawson's abuse and her report of it to her superiors did not show deliberate indifference as a matter of law. She relies on *Jones v. Wellham*, 104 F.3d 620, 627 (4th Cir. 1997), as support for this argument. In *Jones*, a woman who claimed to be the victim of rape by a police officer advanced a Section 1983 action against the police chief. She alleged that the police chief's decision ten years before her rape to put the police officer that raped her back on duty, after he had been accused of sexual misconduct by another woman, constituted deliberate indifference. The Fourth Circuit affirmed the district court's finding of summary judgment in favor of the police chief, observing that the police chief decided not to discharge the officer for the original accusations of sexual misconduct only after a full internal investigation and after he was informed that the state's attorney would not prosecute due to insufficient evidence. *Id.* at 626-27.

> We agree with the district court that on those undisputed facts, [the police chief's] decisions could not be found to be the result of deliberate indifference. With the benefit of hindsight, they were clearly unfortunate, might perhaps be thought imprudent, or even be found legally negligent, but that does not suffice; only decisions taken with deliberate indifference to the potential consequences of known risks suffice to impose municipal liability on the basis that such decisions constituted official County "policy."

Id. at 627.

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Malone argues that *Jones* holds that a supervisor's decision to return an employee to duty ten years before the relevant accusations was too remote, as a matter of law, to find the supervisor liable under Section 1983. We disagree with Malone's reading of *Jones*. The Fourth Circuit was relying on more than a mere remoteness in time to conclude that Section 1983 liability could not rest on the police chief's ten year-old decision to put an officer back on duty; the Fourth Circuit was also relying on the fact that the original accusations had been fully investigated, both by the police department and the state's attorney, and that the state's attorney concluded that there was a lack of evidence to prosecute the police officer. Also, the court was concerned about the time lapse between the police chief's decision and the events giving rise to plaintiff's injury. In our case, Malone conducted no investigation into the Leckis' accusations. She left Lawson in place and the resulting injury to plaintiff occurred only six months later. Given the corroboration of Steven Lecki's allegations by his mother, and the seriousness of the allegations, the jury could reasonably conclude that Malone showed deliberate indifference by failing to take any action whatsoever after receiving the Leckis' information.

Malone also argues that, as a matter of law, she was not deliberately indifferent by doing no more than counseling Lawson after the lap-sitting incident was reported to her. In support of this argument, Malone relies on *Doe v. Taylor Independent School Dist.*, 15 F.3d 443, 456 n. 12 (5th Cir. 1994), for the principle that good faith but ineffective responses may satisfy a school official's obligations under Section 1983. According to Malone, Section 1983 liability cannot lie against her because she made a decision which, in

hindsight, was wrong. Malone further argues that her failure to report the Leckis' accusations immediately and her failure to take further action upon hearing of the lap-sitting do not make her liable because they are two isolated incidents. We disagree, and find that reasonable jurors could conclude that Malone's failure to report the Leckis' accusations immediately, as well as her failure to report the lap-sitting incident to Beckhoff, especially after she knew that Lawson was being investigated for sexually abusing a student, was in reckless disregard of a substantial risk to plaintiff.

Finally, Malone argues that she did not, as a matter of law, show deliberate indifference by monitoring Lawson as she did after Beckhoff instructed her to monitor him. We need not decide this, because we have already found that, as a matter of law, reasonable jurors could conclude that Malone showed deliberate indifference by waiting to pass the Lecki report on to her superiors and failing to report the lap-sitting incident. Nevertheless, we also find that reasonable jurors could conclude that Malone's choice not to increase monitoring activities beyond her normal daily rounds of the school, after Beckhoff instructed her to closely monitor Lawson, showed deliberate indifference.

2. Remittitur

In the alternative, Malone requests that the jury verdict be set aside as excessive, because the alleged specific damages were only $52,000, consisting of past and projected expenses for psychotherapy. Plaintiff responds with six sample cases from five different jurisdictions in which juries awarded larger verdicts to victims of sexual abuse by

authority figures. We find that the jury did not act excessively in awarding $350,000, and that there was ample evidence in the record to support such a verdict, for the humiliation and mental anguish plaintiff has endured because of Lawson's conduct. *See Neese v. Southern Ry. Co.*, 350 U.S. 77 (1955) (where jury awards verdict under federal cause of action, district court should not disturb damage amount supported by the record). The jury heard several days of testimony about a pre-adolescent boy who was subjected to egregious, constant sexual abuse by his teacher, an authority figure children are taught to trust and not to question. It is not unreasonable that the jury awarded more than the special damages proved. For all of these reasons, Malone's motion will be denied.

B. Defendant Alexandria City School Board's Motion for Judgment Notwithstanding the Verdict or in the Alternative a New Trial

The ACSB contends that the $700,000 jury verdict awarded against it was erroneous as a matter of law because plaintiff failed to prove by a preponderance of the evidence that Malone was a school official with the authority to institute corrective measures against Lawson on behalf of the ACSB. The ACSB does not dispute the way the jury was charged on Title IX liability. The jury was instructed that the ACSB may be held liable for damages for the sexual abuse of plaintiff by Lawson if it found that plaintiff proved by a preponderance of the evidence that:

1. Malone was a school official who had authority to institute corrective measures against the offending

teacher, in this case, Craig Lawson, on behalf of the school board;

2. Malone had actual notice of Lawson's misconduct; and

3. After gaining actual notice of Lawson's misconduct, Malone was deliberately indifferent to Lawson's misconduct.

Focusing on the first element of the instruction, the ACSB contends that Malone's authority to institute corrective measures against Lawson was never established for the jury. We agree.

Title IX provides, in pertinent part: "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). In *Franklin v. Gwinnett Co. Pub. Schools*, 503 U.S. 60 (1992), the Supreme Court held that a damages remedy is available for a private cause of action brought to enforce Title IX. Sexual harassment is a form of discrimination for Title IX purposes. *Davis v. Monroe Co. Bd. of Educ.*, 526 U.S. 629, 649-50 (1999).

The jury instructions on the Title IX count were directly derived from *Gebser v. Lago Vista Ind. School Dist.*, 524 U.S. 274 (1998), the leading Supreme Court case on Title IX liability for school districts in the context of teacher on student sexual harassment. In that case, the Court squarely faced the issue of when a school district may be held liable

under Title IX for the sexual harassment of a student by one of the district's teachers. *Id.* at 277. The Court held that traditional agency principles of respondeat superior do not apply to support liability for the school district. It set a higher standard than respondeat superior liability, and articulated the standard on which our instructions were based:

> [D]amages may not be recovered . . . unless an official for the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct.

Id.

In this case, it was undisputed that the only school official from which the ACSB's liability could be derived was defendant Malone. The other school officials about whom evidence was presented were the named defendants Wood, Beckhoff and Masem. Plaintiff advanced a Section 1983 count against these three defendants, however, we found that, as a matter of law, these defendants could not be found liable under Section 1983. During pre-trial motions, we found that plaintiff could not establish that Wood had actual notice of Lawson's abuse of plaintiff. At the close of plaintiff's case, we found that he could not establish that Beckhoff and Masem had actual notice of Lawson's misconduct, to a large extent because Malone had not passed on all the information, nor that they were deliberately indifferent to the allegations about Lawson in that they took reasonable, appropriate measures to immediately investigate the charges and monitor Lawson through Malone. The actual notice and deliberate indifference

elements of Section 1983 are identical to the second and third elements of Title IX. Therefore, plaintiff's failure to prove these elements for the Section 1983 counts against Wood, Beckhoff and Masem precluded him from doing so for the Title IX count against the ACSB. Malone is, therefore, the only possible school official from which the ACSB's liability could arise. Such liability could only be established upon a showing that she had authority to institute corrective measures on the ACSB's behalf.

Although *Gebser* did not discuss who might be an official with the authority to institute corrective measures for purposes of Title IX liability against the school district, the rationale behind its rejection of respondeat superior theories is instructive on that question. *See Floyd v. Waiters*, 171 F.3d 1264 (11th Cir. 1999) (*Gebser* did not go into detail about the "appropriate person" to create Title IX liability of the school district). The Court explained the contractual nature of Title IX, and contrasted it to Title VII, observing that Title IX conditions "an offer of federal funding on a promise by the recipient not to discriminate, in what amounts to a contract between the Government and the recipient of funds." *Gebser*, 524 U.S. at 286. It reasoned that, because the constitutionality of Title IX is rooted in Congress' power under the Spending Clause, and because the statute and its legislative history reflect a *quid pro quo* arrangement — federal funding in exchange for a prohibition of discriminatory conduct — it would be illogical to jeopardize the federal funding of an entire school district because discrimination had occurred if the school district did not know about, and therefore had no chance to cure, the discrimination. The Court therefore rejected principles of

constructive notice and respondeat superior in the Title IX context, because to find otherwise would permit imposing financial liability on a school district that is unaware of the discrimination. *Id.* at 287; *see Davis*, 526 U.S. at 643 ("[a] recipient cannot be directly liable for its indifference where it lacks the authority to take remedial action"); *Franklin*, 503 U.S. at 74 ("[t]he point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for monetary award").

The *Gebser* formulation, "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf," has not been more explicitly defined and the Fourth Circuit has not addressed this issue. The ACSB urges us to adopt the approach of a pre-*Gebser* Fifth Circuit case, *Rosa H. v. San Elizario Ind. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997). *Rosa H.* also rejected traditional agency and constructive notice doctrines as adequate to create Title IX liability against school districts.

> To this point, we have referred simply to the school district's knowledge and the school district's actions. But the district knows and acts only through individuals, whether they be members of the school board, administrators at particular schools, or classroom teachers. We have yet to decide which individuals within the school district must have known of [the teacher's] abuse of [plaintiff] in order for us to conclude that the school district knew of the abuse.

106 F.3d at 659. The court observed, "[w]hether the school official is a superintendent or a substitute teacher, the relevant question is whether the official's actual knowledge of sexual abuse is functionally equivalent to the school district's actual knowledge." *Id.* at 660. The court held:

> [A] school district can be liable for teacher-student harassment under Title IX only if a school official who had actual knowledge of the abuse was invested by the school board with the duty to supervise the employee and the power to take action that would end such abuse and failed to do so. This inquiry circumscribes those school employees in the chain of command whom the school board has appointed to monitor the conduct of other employees, and, as distinguished from reporting to others, remedy the wrongdoing themselves. At the same time, it locates the acts of subordinates to the board at a point where the board's liability and practical control are sufficiently close to reflect its intentional discrimination. It does so by omitting the bulk of employees, such as fellow teachers, coaches and janitors, unless the district has assigned them both the duty to supervise the employee who has sexually abused a student and also the power to halt the abuse.

Id.

Because we find the reasoning in *Rosa H.* to be sound, in light of *Gebser*, we adopt its standard for the "appropriate

person." *See Floyd v. Waiters*, 171 F.3d at 1264 (post-*Gebser* decision endorsing two-part test to establish Title IX liability against a school district: (1) some supervisor with authority to take corrective action was placed on notice of bad conduct, and (2) that supervisor was an official sufficiently high up in the chain-of-command that his acts constitute an official decision by the school district itself not to remedy the misconduct). *Rosa H.* is consistent with *Gebser*'s emphasis on creating liability for the school district only for actions that can be attributed to the school district. If a school district employee, such as a teacher, knows of discriminatory conduct but lacks the power to address the misconduct, by terminating the wrongdoer, for example, then it would contravene the "contractual framework" of Title IX to hold the school district liable for the employee's inaction.

Plaintiff does not challenge the application of the *Rosa H.* standard, but contends that it presented sufficient evidence at trial to demonstrate that Malone had the requisite "corrective" authority. In particular, plaintiff argues that because Malone had the authority to limit Lawson's contact with children after school, as well as to call a meeting between Lawson and plaintiff's parents, she had adequate authority upon which to base the ACSB's liability. Plaintiff cites no specific evidence presented at trial to support these assertions about Malone's power. Nevertheless, plaintiff concedes that Malone lacked the power to terminate Lawson, or even to transfer him to another school or an administrative position. In Virginia, a principal may submit recommendations to the division superintendent for the appointment, assignment, promotion, transfer and dismissal of personnel assigned to her supervision. Va. Code § 22.1-293. The Code does not

authorize a principal to take these actions herself. At trial, Beckhoff testified that Malone could not have suspended Lawson. Also, plaintiff's trial exhibit #5 was a copy of the ACSB policy in force during the relevant school year which authorized only the division superintendent to reassign teachers (as well as principals) within the division.

With respect to plaintiff's unsupported assertions that Malone was empowered to limit Lawson's contact with students before and after school, we find that these would be insufficient "corrective measures," especially in light of the evidence at trial that much of Lawson's sexual contact with plaintiff was during school hours, often in the school bathroom. As for Malone's power to initiate a meeting between Lawson and plaintiff's parents to report the "clinginess" between the two, we similarly find that this does not rise to the level of a "corrective measure," especially in light of the evidence adduced at trial that plaintiff's parents regularly observed physical contact between plaintiff and Lawson and did nothing to stop it.

Several federal courts have addressed whether a school principal has the requisite authority to satisfy the *Gebser* standard, and a few have found that the authority is adequate. However, we are not bound by these decisions and we also note that, typically, a principal's authority in the context of student on student harassment is much greater than her authority in the context of teacher on student harassment. *See Murrell v. School Dist. No. 1*, 186 F.3d 1238, 1248 (10th Cir. 1999) (in student on student Title IX harassment case, principal had requisite authority upon which to base school district's liability because, among other things, she had the

authority to suspend students); *Warren v. Reading School Dist.*, 82 F. Supp. 2d 395, 399 (E.D. Pa. 2000) (finding that the *Gebser* Court did not intend to exclude a school principal from those authorized people whose non-feasance in the face of an allegation of sexual misconduct can lead to school district liability); *see also Crandall v. New York College of Osteopathic Medicine*, 87 F. Supp. 2d 304, 321 (S.D.N.Y. 2000) (supervisor had authority to take corrective measures, in satisfaction of *Gebser* standard, because he was primarily responsible for the design and management of defendant's programs, including selection of supervisory personnel); *Massey v. Akron Co. Bd. of Educ.*, 82 F. Supp. 2d 735, 744 (N.D. Ohio 2000) (knowledge of discriminatory treatment can be imputed to school district if a supervisor has remedial power to hire, fire and discipline the alleged harraser).

Because we find that plaintiff failed, as a matter of law, to prove by a preponderance of the evidence that Malone was an individual with requisite authority to take corrective measures and impose liability on the ACSB for purposes of Title IX, the jury verdict against the ACSB in favor of plaintiff will be reversed. The other issues raised in the ACSB's motion are rendered moot by this finding.

III. CONCLUSION

For all these reasons, we will deny the Motion of defendant Malone and grant the Motion of the ACSB by an appropriate Order.

The Clerk is directed to forward copies of this Memorandum Opinion to counsel of record.

Appendix B

Entered this 12th day of September, 2000.

s/ Leonie M. Brinkema
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 99-621-A

JACKSON BAYNARD

Plaintiff,

v.

CRAIG J. LAWSON, et al.

Defendants.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, defendant Catherine Malone's Motion for Judgment Notwithstanding the Verdict is DENIED; and, it is hereby

ORDERED that judgment be and is entered in favor of the plaintiff against Catherine Malone in the amount of $350,000.

Also for the reasons stated in the Memorandum Opinion defendant Alexandria City School Board's Motion for Judgment Notwithstanding the Verdict or in the Alternative [for] a New Trial is GRANTED as to the motion for judgment; and, it is hereby

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ORDERED that judgment be and is entered in favor of defendant Alexandria City School Board.

In light of these rulings, the parties are directed to try to resolve the pending Motion (Application) by Jackson Baynard for Attorney Fees and Costs.

The Clerk is directed to enter judgment, pursuant to Fed. R. Civ. P. 58, in plaintiff's favor in the amount of $350,000 against Catherine Malone, and in favor of the Alexandria City School Board, and to forward copies of this Order to counsel of record.

Entered this 12th day of September, 2000.

s/ Leonie M. Brinkema
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

Supreme Court, U.S.
FILED
FEB 5 2002
CLERK

(2)

No. 01-955

IN THE

Supreme Court of the United States

JACKSON BAYNARD,

Petitioner,

v.

ALEXANDRIA CITY SCHOOL BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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Respondent, Alexandria City School Board, respectfully prays that the writ of certiorari to review the opinion of the United States Court of Appeals for the Fourth Circuit, with respect to the liability of the Alexandria City School Board pursuant to Title IX of the Education of 1972, 20 U.S.C. § 1681, *et seq.*, be denied.

STATEMENT OF THE CASE

Craig J. Lawson was employed by the Alexandria City School Board during the 1990-1991 school year. He was employed as a sixth-grade teacher, at Charles Barrett Elementary School. Malone was the principal of Charles Barrett at this time. In March of 1990 Steven Leckie, a former student of Lawson's, met with Malone and informed her that Mr. Lawson was a pedophile and that Lawson had sexually abused him fifteen years ago. Mr. Leckie indicated to Malone that he had not pressed charges nor did he desire to pursue criminal charges against Mr. Lawson. Malone took notes during her discussion with Mr. Lawson but took no further action. At the time she received the report from Mr. Leckie, she "had some difficulty about the credibility of it." (R. 112) Malone had never received any similar allegations against Mr. Lawson. She did not report the alleged incident to Child Protection Services because of Leckie's wish not to become involved in a criminal investigation.

Within the next few days, Margaret Leckie, Steven's mother, called Malone to confirm her son's report. Malone asked Mrs. Leckie what she wanted to do about her son's report. From her discussions with Mrs. Leckie and her son, Malone decided not to take any immediate action. Malone decided that because "they were telling me this yet didn't want to do anything about it" (R. 113) the complaint was not credible and that the children in her school were not in any danger of abuse by Lawson. (R. 113)

Petitioner refers to a third report being made to Malone that Mr. Lawson was a pedophile, from a tall, blond, or fair-haired woman. Malone has no "direct recollection of that" (R. 116) and there is no evidence of who this tall, blond woman is.

In the fall of 1990, Baynard transferred to Charles Barrett Elementary and became a student of Mr. Lawson. Lawson started to molest Baynard within the first month of the semester and continued to do so until Baynard began college. Baynard was molested by Lawson on the school grounds before, during, and after school hours, as well as at Lawson's home and on camping trips.

In November of 1990, Lillian Newman, the school librarian, witnessed Baynard sitting on Lawson's lap before school hours one morning. Lawson's arm was around Baynard's shoulders, and their faces were close together. When Lawson noticed Newman observing the scene he immediately jumped up, letting Baynard slide to the floor. Mrs. Newman reported the incident to Malone later that day. Newman indicated that she thought the scene "possibly was inappropriate." (R. 115) Although there was nothing in the report from Ms. Newman that led Malone to believe there was sexual activity happening she spoke with Lawson about the incident. Lawson was very open about the incident and agreed that students should not be so physical. Lawson promised to talk to Baynard about more appropriate behavior.

In November or December of 1990, Rosemary Herman, a teacher at Charles Barrett Elementary, informed Malone that a neighbor told her that Lawson was a pedophile. Malone replied that "she couldn't tell [Herman] not to say anything about this, because it was out in the neighborhood." (R. 23)

It was not until this time that Malone became fearful for Lawson's students, "this sort of linked things for me. I had a report about something from a long time ago; I was now getting another report." (R. 116) In January of 1991, Malone informed the Alexandria City School Board's personnel director, Beckhoff, about the allegations made by Leckie in March 1990 and Herman's report. She also informed Beckhoff that Lawson was very physical with his students. Malone did not inform Beckhoff of the lap-sitting incident. Beckhoff immediately began an investigation. Malone was directed to keep all records of complaints and to monitor Lawson's activities. Malone walked the halls of the school several times in the morning and several times in the afternoon. She made a point to stop at Lawson's classroom. She watched him through the windows during recess. She also looked for notes from students on his desk when Lawson was not in the classroom. Baynard stayed after school with Lawson several times and often received a ride home from Lawson, however, Malone said she never saw them together. Malone did not observe any inappropriate behavior from Lawson during the time period she was asked to monitor him.

Beckhoff interviewed Leckie and his parents as well as the husband of the neighbor who had spoken to Herman. He also looked through Lawson's personnel file and contacted Lawson's previous school district. Beckhoff also contacted Child Protective Services, however, they could not investigate Leckie's allegations because Leckie was no longer a minor. Beckhoff next informed the Alexandria City Police Department but Leckie refused to have a tape-recorded telephone conversation with Lawson, and the investigation was closed for lack of sufficient evidence. Lawson resigned from the school at the end of the school year yet he continued to abuse Baynard until Baynard's freshman year in College. Baynard finally reported the abuse and Lawson was arrested and convicted.

REASONS FOR DENYING THE WRIT

Title IX pronounces "no person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681(a). Sexual abuse of a student by a public school employee is actionable sex discrimination under Title IX for which damages are available. *Franklin v. Gwinnett Cty. Pub. Schools*, 503 U.S. 60, 74-76, 117 L. Ed. 2d 208, 112 S. Ct. 1028 (1992). The Supreme Court identified the elements a plaintiff must prove in order to prevail under Title IX in *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 141 L. Ed. 2d 277, 118 S. Ct. 1989 (1998). In *Gebser*, the Court held that "a damages remedy will not lie under Title IX unless an official who at minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of the discrimination in the recipients programs and fails adequately to respond." *Id.* at 290. Further, the recipient must be deliberately indifferent to the teacher's misconduct. *Id.*

Petitioner argues that lower courts have struggled and continue to struggle with interpreting the proper definitions of both "actual notice" and "appropriate authority" as applied in *Gebser* and that these standards should be made clear by This Court.

The "ambiguity" upon which Petitioner relies is merely an attempt to substitute a constructive notice standard for the actual notice required by this Court in *Gebser*. The Fourth Circuit had no difficulty with defining the notice required by *Gebser* when analyzed in conjunction with This Court's subsequent opinion in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 143 L. Ed. 2d 839, 119 S. Ct. 1661 (1999).

In determining the "appropriate authority" required by *Gebser*, the Fourth Circuit correctly examined Virginia law on this issue. Contrary to the assertion by Petitioner that the differing outcomes in the Courts below result from confusion, in actuality, any such variation is the natural result of differing statutory choices made by states in the distribution of authority in their school systems.

I. Actual Notice

The Court of Appeals for the Fourth Circuit did not find the term "actual notice" to be ambiguous: "to the extent there is any doubt about the nature of the actual notice requirement articulated in *Gebser*, it is removed by the subsequent opinion of the Court in Davis." Appendix A at 17a. In *Davis v. Monroe County Board of Education*, 526 U.S. 629, 143 L. Ed. 2d 839, 119 S. Ct. 1661 (1999) The Court held that under Title IX, a recipient of Federal education funds can be liable in damages "where it is deliberately indifferent to known acts of sexual harassment by a teacher." *Davis*, at 641. Liability for a school district under both agency principles and negligence principles were rejected, and The Court established that the district could be liable only for acts of which it had actual knowledge. *Id.* at 642.

Petitioner argues that the Fourth Circuit has adopted "the most stringent end of the spectrum for determining liability in Title IX" cases. Petition at 14. He further argues that the standard for actual notice recognized by the Fourth Circuit can only be satisfied by actual knowledge of current abuse. However, The Court of Appeals did not circumscribe the "actual notice" standard to current abuse as the petitioner suggests. Rather the standard, taken from Davis, encompasses known acts of both current and previous abuse. *Davis*, at 642. Nowhere is it declared that the acts of abuse must be contemporaneous with the notice.

Gebser offers further insight into the meaning of "actual notice" in outlining what it does not mean: "we declined the invitation to [hold] the district liable for its failure to react to teacher-student harassment of which it knew or should have known." *Gebser*, at 282. Petitioner points out that several lower courts have employed a standard which defines actual notice as sufficient evidence to deduce a school employee is a substantial or obvious risk to abuse children. Petition at 16. This standard, which petitioner would have the Court adopt, would be the equivalent of constructive notice, which the Court in Gebser refused to accept. To use a constructive notice standard would "frustrate the purposes" of Title IX. *Gebser*, at 288-89. In Title VII cases, a plaintiff can show constructive notice by demonstrating the "pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge." *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982). Extending this standard to Title IX cases would mean that if the school district should have known about Lawson's abuse, or should have drawn the conclusion that he was abusive, it would be liable on the basis of its constructive notice of sex discrimination. Imputing liability to a school district under a theory of constructive notice is at odds with the fundamental objective of Title IX. *Gebser*, at 289. One of the key objectives of requiring notice is to prevent diverting education funding from salutary uses where a recipient had no knowledge of discrimination in its programs. *Id.*

In interpreting the meaning of actual notice in *Rosa H. v. San Elizario Independent School District*, 106 F.3d 648 (5th Cir. 1997), the Fifth Circuit looked at recent cases involving the concept of deliberate indifference. *Rosa*, at 658. The court examined *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994), a case involving the

issue of what constitutes deliberate indifference when an inmate brings a suit against prison officials for conditions that violate his Eighth Amendment rights. *Id.* In *Farmer*, the Supreme Court found deliberate indifference to fall under the basic category of recklessness. *Farmer*, at 1978. The Court acknowledged a distinction between recklessness as failing to act in the face of an unjustifiably high risk of harm that is known or that is so apparent that it should be known and recklessness as disregarding a risk that is actually known. *Id.* The court adopted the latter, subjective test, holding that the official must both be aware of facts from which the conclusion could be drawn, and he must also actually draw the conclusion. *Id.* The distinction highlighted in this case helps show the difference between an intentional wrong and a wrong that occurs because of simple neglect. *Id.* The Fifth Circuit used this analysis to reach its holding that a school district has not sexually harassed a student unless it is knows of a danger of abuse and chooses not to lessen that danger. *Rosa*, at 659. The Court recognized that it borrowed analysis from a different area of the law, yet it felt that these cases "clarify the indispensable role that deliberate action plays when ability stems from intentional conduct such as punishing or discriminating." *Id.* The court held that Title IX liability will not exist if a plaintiff fails to show that the school district actually knew that the students faced a substantial threat of sexual harassment. *Id.* Put differently, a plaintiff will not succeed if the district can show that it did not know the underlying facts signifying a substantial danger or that it did know the underlying facts but believed (although unwisely) that the risk was insubstantial or nonexistent. *Id.*

Here Malone was aware of a report of alleged abuse occurring fifteen years ago. She believed there was no danger.

Arguably she had enough facts to draw a conclusion, but she did not draw the conclusion. She did not believe Leckie's report to be credible when he told her that he wanted to make her aware and did not want to pursue criminal charges. Petitioner alludes to four reports, however, as mentioned in the statement of the case above, the first two reports involve Leckie, Malone does not recall the third report being made, and the fourth report from Herman was when Malone took action. The lap-sitting incident was dealt with as Malone thought appropriate. She questioned Lawson about the incident and directed him to be less physical with students. When Malone received a complaint from Herman she took action and notified the superintendent. She monitored Lawson by walking by his room numerous times a day, watching him through the windows at recess and searching his room for evidence. Malone uncovered no evidence that Lawson was abusing Baynard or any of the other students. Malone did not have actual notice. She mistakenly believed the risk of abuse by Lawson to be insubstantial.

In looking to *Gebser*, *Davis*, and *Rosa*, as the appellate court did, the meaning of actual notice becomes clear. The petitioner is unable to show that Malone actually knew Lawson was a substantial danger to the students. What Malone should have known or should have concluded is immaterial.

II. Appropriate Authority

The Fourth Circuit correctly held that Virginia law does not empower principals with sufficient authority to deem them the proxy of the School Board under Title IX.

Petitioner also argues that a school principal is an appropriate authority to institute remedial measures for purposes of Title IX. In *Gebser* the Court carefully limits the scope of liability by holding "a damages remedy will not lie under Title IX unless an official who at minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails to adequately respond." *Gebser*, at 290. The language employed by the Court, particularly the clause "who at minimum", indicates the intended restrictiveness of this standard. *Gebser* makes clear that many school employees are not officials "who at a minimum" have authority to take remedial action.

It should be noted that some of the facts in *Gebser* are analogous to the facts in the instant case. In *Gebser*, the victim did not report anything to the principal but two other students did. They complained to the principal about the teacher's inappropriate comments in class. The principal advised the teacher to be careful about classroom behavior, but did not report the parents' complaints to the school's superintendent. Only later, after it was discovered that the teacher was having sex with the victim, did the school terminate his employment. Similarly, Malone did not receive a report from the victim. She received other reports and advised Lawson to be careful about his behavior with the students, but she did not report anything to her superiors. The Court in *Gebser* concluded that there was no actual notice from the facts presented. The Court does not explicitly state whether a principal constitutes an appropriate authority, but the language of the court suggests that a principal, in fact, is not an appropriate authority: "[t]he only official alleged to have information about Waldrop's misconduct is the high school principal." *Id.* at 291.

Petitioner contends that this case should be heard because there is a lack of clarity concerning who constitutes an appropriate authority, which has resulted in confusion among the lower courts, which in turn "has left the lower courts to create tests on an ad hoc basis with differing results." Petition at 17. Petitioner cites *Warren v. Reading School District*, 82 F. Supp. 2d 395 (E.D. Pa. 2000) as the case which has held a principal to be an appropriate authority to institute remedial actions. A diverse result, one which petitioner does not like, is the decision by the Court of Appeals for the Fourth Circuit in the instant case. The Court of Appeals for the Fourth Circuit held that the principal was not an appropriate person to take corrective measures. Appendix at 19a. The Court further held that remedial measures must incorporate the power to hire and fire the offending employee for the official on notice to be an appropriate person. Appendix at 20a. In reaching their decision they agreed with the Fifth Circuit's holding in *Rosa*, concluding that the test of whether a supervisory employee may be seen as the proxy of the school district is whether or not the school district bestowed upon that employee the traditional powers of an employer. Appendix at 19a. The Fifth Circuit explained these traditional powers to be the authority to hire and terminate employees. *Rosa*, at 660.

Petitioner truthfully asserts that there are differing results among the Circuits. However, he fails to understand that this is natural. Schools are managed and operate differently from state to state. Within school systems, authority and power are distributed differently. *Gebser* did not list who was to be an appropriate person for these reasons. Likewise in *Rosa*, the court hesitated to establish firm categories:

> school districts contain a number of layers of responsibility below the school board:

> superintendents, principals, vice-principals, and teachers and coaches, not to mention specialized counselors such as Title IX coordinators. Different school districts may assign different duties to these positions or even reject this traditional hierarchical structure all together. We do not wish to restrict the applicability of our analysis by keying liability to certain job titles within the school system. Whether the school official is a superintendent or a substitute teacher, the relevant question is whether the official's actual knowledge of sexual abuse is functionally equivalent to the school district's actual knowledge.

Id. These cases should be examined on an ad hoc basis for school systems are not identical across the Nation. The Court of Appeals has looked at the facts of this case and has ruled very clearly that Malone was not an appropriate authority to take corrective actions.

Petitioner alleges that this "hire and fire" test will persuade other school districts to make sure that no one individual can hire and fire a teacher thereby shielding school boards from liability. The Fifth Circuit Court of Appeals addressed a similar concern in *Rosa*:

> [s]ome might suggest that the approach we adopt today creates incentives for school boards to stick their heads in the sand. Our response is two fold. First, we are not writing here as a common-law court. We are interpreting a federal statute. Second, school boards that adopt a head-in-the-sand policy would be foolish indeed,

> morality aside, because they would encounter other problems, such as the threat of liability under 42 U.S.C. § 1983.

Id. at 657-658.

Next petitioner argues that a principal should be the appropriate authority to receive notice in order to take corrective measures because the principal is the official who is responsible for the supervision of the employees and the school's operation. Petitioner quotes *Banks v. Sellers, et al.*, 224 Va. 168, 294 S.E.2d 862 (1982), "[t]he principal is, for his [or her] school, essentially a counter part of the superintendent . . . the function is very similar," in supporting his claim. This argument has two flaws. First, it assumes mistakenly that a superintendent has been classified as an appropriate authority. Second, it relies on an incomplete quotation. The quotation in its entirety reads, "[a] principal is essentially a counterpart of the superintendent, although, the fundamental authority is diminished and restricted, the function is very similar." Authority is the paramount issue here, as we are discussing who may be an appropriate authority, and here we are told that the fundamental authority of the principal is much less than that of the superintendent.

In Virginia, the State Constitution gives control of the school system to the school board. Va. Const. Art. VIII § 7. The principal of a public school is not the fundamental equivalent of the school district, and the principal must not be considered the proxy of the school district. The powers to hire, fire, transfer, and suspend teachers rest exclusively with the school district and the principal has no authority in such matters. Va. Code Ann. § 22.1-295(A) (Michie 2000). When a school board chooses who to furnish with the power

to handle such personnel actions, it is deciding who acts for the board. *Rosa*, at 660. The Court of Appeals felt that Virginia had made a cognizant decision not to give the principal the ability to act as an employer by not vesting him with the ability to hire and fire, "[s]imply put, Virginia has made an explicit policy decision that school principals do not exercise the powers of an employer on behalf of the school district." Appendix A at 20a.

In *Rosa*, the Court narrowed the class of appropriate employees to those "whom the school board has appointed to monitor the conduct of other employees, and, as distinguished from reporting to others, remedy the wrongdoing themselves." *Rosa*, at 660. Here the principal did not have authority to remedy the wrongdoing herself. She could not have fired or suspended Lawson. She could only report it to her superiors, but this is not sufficient to constitute an official decision by the school board. Anyone can report allegations of misconduct to their superiors. Petitioner argues that Malone could have taken corrective measures by removing Jackson from Mr. Lawson's class, informing Jackson's parents, or by ordering Mr. Lawson not to see or talk with students outside of class. Petitioner made these arguments at the trial court level and he raises them once again, unsupported by any evidence that Malone had authority to take any of these actions. Moreover the trial court found that these actions did not constitute "corrective measures", particularly with regards to the facts of this case. Because much of the contact occurred in school, mostly in the bathroom, and because the petitioner's parents were aware of the amount of time the petitioner and Lawson spent together, these measures would not have been adequate.

CONCLUSION

Admittedly the standards adopted by the Fourth Circuit Court of Appeals are stern. But using a more lenient standard would create too many risks. There would be a genuine risk that school districts would be liable in damages for its employees' independent actions, on top of their own official actions. In addition if a lower standard is accepted, there is a great risk that school officials will endanger school districts simply by their negligent actions. Finally, it is unsound to risk the federal funding of an entire school district when the school district does not have actual knowledge of the discrimination and the chance to cure it. For these reasons and those set forth above, the respondent urges The Court to deny this petition for writ of certiorari.

Respectfully submitted,

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